THE GOOD, THE BAD, AND THE UGLY: DRUG TESTING BY EMPLOYERS IN ALASKA

This Note examines Alaska's 1997 Drug and Alcohol Testing by Employers statute. It first performs a brief overview of the legal implications of employer drug testing. Next it examines Alaska's Act from the perspectives of both employers and employees. The Note then considers similar drug testing legislation on the state and federal level and provides a brief description of the political climate that has led to the abundance of legislation on drug testing. It concludes that the perceived workplace drug crisis prompting such legislation rests on faulty premises and should be reconsidered.

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation camp cases, and the Red scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

— *Justice Thurgood Marshall*[1]

I. INTRODUCTION

In September 1997, the Alaska Legislature joined a growing number of states when it passed legislation designed to facilitate the use of employment drug testing by private employers. The Drug and Alcohol Testing by Employers statute, Alaska Statutes sections 23.10.600-23.10.699[2] (the "Act"), provides guidelines for drug testing procedures,[3] while protecting employers from liability for both adverse employment actions taken on the basis of drug

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1. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J. dissenting) (upholding federal regulations mandating drug testing for railroad employees) (internal citations omitted).

2. *See* ALASKA STAT. §§ 23.10.600-99 (LEXIS 1998).

3. *See id.* § 23.10.640.

testing results[4] and inappropriate disclosure of an employee's confidential information.[5] The employer is entitled to the protections of the Act as long as the specified procedures are followed.[6] The statute allows employers to drug test for any job-related purpose consistent with business necessity.[7] Although compliance with the Act is voluntary,[8] the protections embedded within it provide indisputable incentives for private employers to undertake drug testing of all employees.

Although the Alaska Legislature failed to provide a section detailing the purpose of the statute or the underlying findings upon which the statute is based, it seems clear that an increase in the number of Alaskan private employers conducting drug tests is one of the desired results. Like similar statutes in Utah[9] and Arizona,[10] the Alaska statute was based on the President's Commission on Model State Drug laws.[11] Both Utah and Arizona provide a statement of legislative intent. The Utah Legislature states that

> [t]he abuse of drugs and alcohol creates a variety of workplace problems . . . . Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.[12]

The Arizona Legislature indicated that "[t]he abuse of illegal drugs and alcohol is a matter of substantial public concern. The intent of the Legislature in this Act is to encourage the development of uniform standards and requirements regarding the testing of employees and prospective employees for use of such substances in the work setting."[13] The goal of the Utah, the Arizona, and, by analogy, the Alaska statute is thus not only to encourage drug

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4. *See id.* § 23.10.600.
5. *See id.* § 23.10.610.
6. *See id.* § 23.10.640.
7. *See id*. § 23.10.620(c).
8. *See id.* § 23.10.615.
9. *See* UTAH CODE ANN. §§ 34-38-1 to 15 (1998).
10. *See* ARIZ. REV. STAT. ANN. §§ 23-493.01 to 11 (West 1995).
11. *See Cutting Edge Issues in Drug Treatment and Testing: Hearings on H.R. 3853 Before the Subcomm. on Nat'l Security, Int'l Affairs and Criminal Justice of the Comm. on Bov't Reform and Oversight*, 105th Cong. (1998) (statement of Mark de Bernardo, Executive Director, Institute for a Drug-Free Workplace) [hereinafter Hearings] (noting that the legislation endorsed by the President's Commission on Model State Drug Laws was enacted into law in Alaska, Arizona, Idaho, and Utah).
12. UTAH CODE ANN. § 34-38-1 (1998).
13. 1994 Ariz. Legis. Serv. 246 § 1 (West).

testing by shielding employers from litigation, but also to ensure that the drug testing performed on employees is equitable and based on uniform standards. The drug testing statutes provide the strongest protection to employers, but also protect employees by requiring employers to comply with fair and standard testing procedures, thus limiting the opportunity for abuse of discretion by employers.[14]

Part II of this Note will analyze the Alaska drug testing statute by providing a brief overview of the legal implications of employment drug testing, including contract, tort, and common law claims. Part III will examine the Act from the perspectives of both employers and employees. This consideration will include the requirements imposed by the statute, the protections provided if these requirements are met, and the potential problems this statute causes both employers and employees.

Part IV will examine similar drug testing legislation on the state and federal level. In Part V, this Note will provide a brief description of the political climate that has led to so much legislation on workplace drug testing, ultimately concluding that the perceived workplace drug crisis prompting such legislation rests on faulty premises and should be fundamentally reconsidered before further measures are passed.

II. LEGAL CHALLENGES TO DRUG TESTING

Both the United States Constitution and the Alaska Constitution protect an individual's right to privacy. The U.S. Constitution provides this protection in the penumbra of the Bill of Rights,[15] while the Alaska Constitution explicitly guarantees the right to privacy in Article I, Section 22: "Right of Privacy. The right of the people to privacy is recognized and shall not be infringed."[16] The U.S. Constitution has been interpreted to govern only state action,[17] except for the Thirteenth Amendment's prohibition of slavery, which also applies to private action.[18] The

14. *See id.*; *see also* ALASKA STAT. § 23.10.640 (LEXIS 1998); ARIZ. REV. STAT. ANN. § 23-493.03 (West 1995); UTAH CODE ANN. § 34-38-1, § 34-38-6 (1998).

15. *See* U.S. CONST. amends. I-X.

16. ALASKA CONST. art. I, § 22.

17. *See* Skinner v. Railway Labor Executive Ass'n, 489 U.S. 602, 614 (1989) (noting that "the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative.").

18. *See* U.S. CONST. amend. XIII; *see also* Clyatt v. United States, 197 U.S. 207 (1905), *cited in* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (1989).

Alaska Constitution also has been interpreted to apply to state action.[19] In *Luedtke v. Nabors Alaska Drilling, Inc.*,[20] the Alaska Supreme Court declined to extend the constitutional right to privacy to the actions of private parties.[21] Thus, neither constitution protects the privacy rights of employees in the private sector who are subject to drug testing.

The Alaska Supreme Court's decision in *Luedtke* is notable, however, for establishing "a public policy protecting spheres of employee conduct into which employers may not intrude."[22] The court noted that "the citizen's right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska. The constitution protects against governmental intrusion, statutes protect against employer intrusion, and the common law protects against intrusions by other private persons."[23] Alaska also recognizes a covenant of good faith and fair dealing in employment contracts for at-will employees,[24] which can be breached by an employer's violation of public policy.[25] However, the court failed to find that this public policy protecting employee privacy is violated by employer monitoring of employee drug use occurring outside the workplace.[26]

In *Luedtke*, the court upheld an employer's discharge of two employees for refusing to submit to a drug test, holding that the employer's safety interest outweighed the employees' right to privacy.[27] The *Luedtke* court did place restrictions on drug testing,

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19. *See* United Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983) (equal protection and civil rights); Woods & Rhode, Inc. v. State, Dep't of Labor, 565 P.2d 138 (Alaska 1977) (unreasonable search and seizure); Ravin v. State, 537 P.2d 494 (Alaska 1975) (right to privacy in Alaska). These cases were all cited in *Luedtke*, 768 P.2d at 1129-30.

20. 768 P.2d 1123 (Alaska 1989).

21. *See id*. at 1130.

22. *Id*. at 1133.

23. *Id.*

24. *See* Mitford v. de LaSala, 666 P.2d 1000 (Alaska 1983).

25. *See* Knight v. American Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986) ("We have never rejected the public policy theory. Indeed, it seems that the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing which we accepted in Mitford.").

26. *See Luedtke,* 768 P.2d at 1133.

27. *See id.* at 1137. An important factor for the court was the extreme danger inherent in oil rig work. In a less dangerous industry, the employer's safety concerns may not have taken precedence over the employee's right to privacy. An unresolved question is how Alaska Statutes sections 23.10.600-99 will affect the analysis of a breach of the implied covenant of good faith and fair dealing in

however, requiring that the test be conducted at a time reasonably contemporaneous with work time and that employees receive notice of the adoption of a drug testing program.[28] Because one of the discharged employees was initially suspended for a drug test taken prior to the employer's announcement of its drug testing program,[29] the court remanded for a determination of whether his suspension breached the covenant of good faith and fair dealing for lack of notice.[30] In addition, the court found that the employer did not commit the common law tort of invasion of privacy when it drug tested the employees, since the test was not conducted in an unreasonable manner nor for an unwarranted purpose.[31]

The Alaska Supreme Court in *Luedtke* has thus upheld drug testing in the face of constitutional, contract, and common law challenges. However, the *Luedtke* court did not face the issue of how federal discrimination laws impact employment drug testing. Thus far, no court has addressed the interplay of the Americans with Disabilities Act ("ADA")[32] with an Alaskan employer's decision to drug test. While the ADA explicitly allows employer drug testing by indicating that drug testing is not a prohibited medical exam,[33] it does restrict employers' use of confidential employee medical information.[34] Thus, although the ADA may not serve as a bar to drug testing, it can provide an important protection to employees concerned about the ramifications of providing employers with urine or other samples for drug testing,

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the drug testing context, and whether the public policy protecting employee privacy will be damaged because of these sections of the statute.

28. *See id.* at 1136-37. These requirements were eventually included in the Alaska Legislature's adoption of sections 23.10.600-99. *See infra* notes 38-45 and accompanying text.

29. *See Luedtke*, 768 P.2d at 1125-26.

30. *See id*. at 1137.

31. *See id*. The court concluded that the test was not performed in an unreasonable manner because the employee voluntarily provided the sample, despite the fact that he did not know it would be tested for illegal drugs. The court also concluded that the test was not performed for an unwarranted purpose because the court had already determined that the employer's safety interest was a legitimate purpose.

32. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* (1994).

33. *See id.* § 12114(d)(1).

34. *See id*. § 12112(d)(3)(c); *see also* Roe v. Cheyenne Mountain Conf. Resort, Inc., 124 F.3d 1221 (10th Cir. 1997) (upholding summary judgment for employee on claim that employer's required disclosure of prescription drug usage in relation to drug testing violated section 12112(d)(4) of the ADA). The disclosures in *Cheyenne Mountain* had to be "reported and approved by an employee supervisor." *Id.* at 1226.

as well as the disclosures of confidential medical information that typically accompany drug testing.

III. STATUTORY EXPLANATION

Since the courts have paved the way for more private employers to establish drug testing programs, it was inevitable that state legislatures would soon follow. In enacting this drug testing statute, the Alaska legislature recognized the potential for abuse in conducting employment drug testing, and provided guidelines to employers on conducting such tests. However, the Alaska Legislature was also faced with a risk-free opportunity to demonstrate a "tough on drugs" position without costing taxpayers a penny.[35] Any costs associated with drug testing are borne by the employers themselves, and because employer compliance is voluntary, there are no enforcement or regulatory costs. In addition, the interests of the business community in achieving a safe workplace, preventing absenteeism, mitigating insurance costs, and avoiding association with drug users are well served by allowing more employers to implement drug testing without the threat of litigation. However, the Act fails to provide employees with equally valuable protections,[36] and fails employers in some important respects as well.[37] The Alaska Legislature missed a rare opportunity to pass legislation that satisfies the needs of a large cross-section of their constituency, both employers and employees, when it omitted many provisions that could have made the Act a more valuable statute.

A. The Employer's View of Alaska Statutes Sections 23.10.600-99

1. *Employer Requirements*. In order for employers to receive the vast array of protections provided by the Act, they must

35. Legislative testimony on the proposed Private Sector Drug-Free Workplace Act, the Federal counterpart to the Act, is instructive here. *See generally Hearings*, *supra* note 11 (Mr. de Bernardo cites one of the benefits of the Private Sector Drug-Free Workplace Act as the fact that it is "revenue neutral. . . . This bill would not cost the taxpayers a dollar. . . . There is no need for government regulation and enforcement since the process is self-policing, an employer who does not comply simply would be subject to potential legal liability."). *See also infra* notes 171-180 and accompanying text (discussing the proposed Private Sector Drug-Free Workplace Act).

36. *See infra* notes 102-131 and accompanying text (highlighting employee problems with the Act).

37. *See infra* notes 86-94 and accompanying text (highlighting employer problems with the Act).

comply with both the extensive administrative requirements[38] and the stringent testing procedures[39] set out in the statute. Before initiating a drug-testing program, the Act requires employers to establish a written policy at least thirty days prior to the start of the program.[40] The employer must distribute the written policy to employees or ensure that it is available in a personnel handbook, manual, or posting.[41] At a minimum, the written policy must include the following: (1) the employer's policy on employee drug and alcohol use; (2) a description of those employees subject to testing; (3) the circumstances under which testing may be required; (4) the substances for which tests will be conducted; (5) a description of the testing methods and procedures to be used; (6) the consequences of a refusal to participate in testing; (7) the adverse personnel action that may be taken based on the results of the testing; (8) the employee's right to obtain written test results and the employer's obligation to provide those results within five working days, so long as the request is within six months of the testing date; (9) the employee's right to explain, upon employee's request and in a confidential setting, a positive test result; and (10) the employer's policy regarding the confidentiality of the test results.[42]

There are many requirements governing the testing procedures and sample collection that employers must meet in order to receive the Act's shield from litigation.[43] Drug testing required by the employer must be scheduled during, immediately before, or immediately after a regular work period, and the time taken for testing must be considered work time for the purposes of compensation and benefits.[44] In addition, the employer must pay the entire cost of the drug test and for reasonable transportation costs to the testing site if the test is not conducted at the employee's normal work site.[45] The employer must ensure that sample is collected "in a manner that guarantees the individual's privacy to the maximum extent consistent with ensuring that the sample is not contaminated, adulterated, or misidentified."[46] Although the employer may designate the type of sample to be

38. *See* ALASKA STAT. § 23.10.620 (LEXIS 1998).
39. *See id.* §§ 23.10.630-50.
40. *See id*. § 23.10.620(e).
41. *See id.* § 23.10.620(a).
42. *See id.* § 23.10.620(b).
43. *See id.* §§ 23.10.630-50.
44. *See id.* § 23.10.630(c).
45. *See id.* § 23.10.630(d).
46. *Id.* § 23.10.630(c).

used for testing,[47] the statute defines "sample" as "urine or breath from the person being tested."[48] It is uncertain whether the Act will protect employers who conduct drug testing based on analysis of hair, sweat, or saliva.[49]

To receive the protections of the Act, employers must conduct the drug testing at a laboratory approved or certified by the Substance Abuse and Mental Health Services Administration (or the College of American Pathologists, American Association of Clinical Chemists), and the testing must comply with scientifically accepted analytical methods and procedures.[50] The samples must be fully documented, collected, stored, and transferred in a manner reasonably designed to prevent misidentification, contamination, or adulteration.[51] The person tested must have an opportunity to provide medical information relevant to the test, including identification of prescription and non-prescription drugs that might affect the outcome of the test.[52]

The Act further requires confirmation of a positive test result by a different analytical process than that used in the first test.[53] The statute provides that the second, or confirmatory, test must be the more expensive gas chromatography/mass spectrometry method.[54] Positive confirmatory results must also be reviewed by a

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47. *See id.* § 23.10.630(a).

48. *Id.* § 23.10.699(9).

49. Although these methods of testing are somewhat less intrusive than urine testing, they are more controversial because dark hairs tend to absorb more drugs than lighter hairs when the same amounts of drugs are consumed. *See Federal Workplace Drug Testing: U.S. House of Representatives Comm. on Commerce, Subcomm. on Oversight and Investigations, Dept. of Health and Human Services Policy on Drug Testing Panel 1*, 105th Cong. (1998) (statement of Carl M. Selavka, Ph.D., Consulting Scientist to Dept. of Health and Human Services Drug Testing Advisory Board [hereinafter Federal Workplace Drug Testing]. Dr. Selavka also served as consultant to review and summarize data provided by hair, sweat, and saliva drug testing proponents.).

50. *See* ALASKA STAT. § 23.10.640(c).

51. *See id*. § 23.10.640(a).

52. *See id*.

53. *See id*. § 23.10.640(d).

54. *See id*. This form of test is generally considered more reliable than immunoassays, the most widely used method in workplace drug testing. *See* Steven Hecker, *Technical Issues and Procedural Safeguards in Workplace Drug Testing*, 7 LERC MONGRAPH SER. 52, 54-57 ("[p]roperly done, the [gas chromatography/mass spectrometry] provides the most conclusive identification of all the urine screening techniques. However, it relies on expensive equipment, highly trained technicians, and is quite expensive."). Immunoassays are attractive to employers because they can be:

licensed physician or doctor of osteopathy, often referred to in the Act as a Medical Review Officer ("MRO").[55] The MRO's responsibilities include contacting employees within forty-eight hours of testing, offering to discuss positive test results, interpreting and evaluating the test results for legal use, and reporting results caused by prescription medicine as negative results.[56] Although the statute does not address the costs associated with the MRO's duties, it appears that they must be borne by the employer. To aid in the determination of whether reasonable suspicion exists to require an individual employee to undergo testing, employers must train at least one employee for sixty minutes on alcohol misuse and sixty minutes on use of controlled substances.[57] Finally, if an employer decides to test for drugs for which the United States Department of Health and Human Services ("HHS") has already established a cutoff level, then a test will be considered positive if the employee's sample is greater than or equal to that cutoff level.[58] If the test is for a drug for which no cutoff level has been established, the employer must inform employees in the written policy of the cutoff level that will be used.[59]

If employers opt to conduct on-site drug testing,[60] they assume more extensive commitments to fairness and objectivity than if they conducted off-site testing. They must use testing products approved by the Food and Drug Administration ("FDA"), and these products must be used in accordance with the manufacturer's instructions.[61] The testing must be administered by someone who has been trained in person by the manufacturer of the test and

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> highly automated and hence are quite inexpensive, costing as little as $10 per sample. . . The very principle of these tests, however, raises some problems. Since the tests depend on the binding of an antibody to the drug, other substances which compete with the drug for the antibody, including legal medications, food metabolites, or the body's own enzymes, may cause false results. This cross-reactivity necessitates that positive immunoassay results be confirmed by an independent procedure.

Id. at 55.

55. *See* ALASKA STAT. § 23.10.640(d).

56. *See id.*

57. *See id.* § 23.10.650(a). The designation of this individual implies that when drug testing is based on reasonable suspicion, this individual's training will be utilized to determine who will be tested. However, this does not indicate that drug testing will be based on reasonable suspicion in all cases.

58. *See id*. § 23.10.640(e).

59. *See id*.

60. *See id.* § 23.10.645(a).

61. *See id*.

certified by that manufacturer as competent to administer the test.[62] Additionally, the administrator of on-site drug tests must be trained to recognize adulteration of a sample and sign a statement that he or she will hold all information related to drug testing confidential.[63] The Act also requires that the administrator of an on-site test allow the employee to observe both the testing procedure and the results, and must keep the test sample in the employee's sight at all times.[64] The employer may not take permanent employment action based on an unconfirmed on-site positive result.[65] If the employer takes temporary adverse employment action on this basis, the employer must restore the employee's wages and benefits if the confirmatory test is negative.[66]

Throughout the testing process and the resulting action, employers may not disclose any information regarding drug test results to anyone other than the tested employee, those designated by the employee to receive the information, those designated by the employer to receive and evaluate test results, or as ordered by a court or governmental agency.[67] The employer bears the burden of ensuring confidentiality of results and records of drug tests. However, because the protections offered to employers by the Act are not jeopardized by breaches of confidentiality,[68] employers have less incentive to comply with this provision than with the other requirements of the statute.

The extensive administrative requirements,[69] specified testing procedures,[70] and increased financial burden[71] posed by the Act may discourage employers from complying with its provisions, even at the risk of litigation over drug testing. While this statute may provide great benefits to employers, it is clear that these benefits do not come without substantial costs.

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62. *See id.* § 23.10.650(b).

63. *See id*.

64. *See id*. § 23.10.645(b).

65. *See id*. § 23.10.645(c).

66. *See id.*

67. *See id*. § 23.10.660.

68. *See id*. §§ 23.10.600-10. Disclosures of confidential information to unauthorized individuals are not actionable unless stringent conditions are met. *See also infra* notes 117-127 and accompanying text (detailing disclosure provisions).

69. *See* ALASKA STAT. § 23.10.620; *see also supra* notes 38-42 and accompanying text.

70. *See* ALASKA STAT. §§ 23.10.630-50; *see also supra* notes 43-59 and accompanying text.

71. *See id.*

2. *Employer Protections*. Employers who comply with the many requirements of the statute discussed above will be protected from an action for damages for the following: (1) actions in good faith based on a positive drug test result;[72] (2) failure to test for drugs or alcohol impairment; (3) failure to test or detect a specific drug, other substance or medical condition (including mental and emotional disorders); and (4) termination or suspension of drug testing policy.[73] Employers are also protected from actions for damages related to the employer's action, or inaction, with respect to a "false negative" test, that is, a test of an employee who uses drugs but produces a mistakenly negative drug test result.[74] Finally, employers are protected from actions for failure to establish a substance abuse prevention program or to implement drug testing.[75]

The statute provides a further protection by severely limiting the legal recourse of employees who suffer an adverse employment action or whose confidential test results are disclosed when the drug test results constitute a "false positive," a drug test which mistakenly comes out positive and is later determined to be inaccurate.[76] The statute specifically provides that

> [a] person may not bring an action for damages based on test results. . . unless the employer's action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result because of reckless or malicious disregard for the truth or wilful [sic] intent to deceive or be deceived.[77]

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72. The statute refers to both "drug test and alcohol impairment test." ALASKA STAT. § 23.10.600(a). However, this Note uses the term "drug test" to refer to both types of testing.

73. *See id*. The legal challenges may not entirely disappear, as employees will likely attempt to challenge this statute under the public policy theory of the covenant of good faith and fair dealing. *See supra* notes 15-34 and accompanying text (detailing legal challenges to drug testing).

74. *See id*. § 23.10.600(d).

75. *See id*. § 23.10.600(e). This clause is set out separately from the provisions cited *supra* note 73, most likely because the previous section prohibited actions for damages, while this section refers to any actions at all. Unfortunately, the structure of the statute makes it difficult to determine when money damages are prohibited and when any particular cause of action is prohibited.

76. *See id.* § 23.10.610.

77. *Id*. § 23.10.600(b). It is unclear how an employer should have notice or constructive notice that an employee is not a drug user in his or her private life, or how an employee will be able to prove that his employer had such notice. This section effectively eliminates any actions for damages an employee might have for

The statute also prevents an employee from bringing actions for defamation of character, libel, slander, or damage to reputation against an employer based on drug testing unless specific criteria are met. The results must be disclosed to someone unauthorized to receive the information, the information disclosed must be a false positive test result, the false positive must have been disclosed negligently, and all the elements of the action, whether for defamation of character, libel, slander, or damage to reputation, must be satisfied.[78] Because it seems negligence is involved any time confidential information is disclosed to an unauthorized individual, the requirement that the disclosure be made "negligently" implies that something more than a mere disclosure must take place.[79] Employees will have difficulty proving that information has been disclosed negligently, so most instances of disclosed false positive results will not be actionable. Any harm to employers from the statute's ambiguity in this area is mitigated by the provision stating that in claims against employers based on false positive test results, "there is a rebuttable presumption that the test is valid if the employer complied with the provisions" of the statute.[80] As noted above, employers are also protected if their reliance on a mistakenly false positive test result was reasonable and in good faith.[81]

The statute provides further protection for employers from the uncertainties of drug testing by allowing drug testing for "any job-related purpose consistent with business necessity and the employer's policy."[82] The statute allows drug testing for reasons including, but not limited to, investigation of individual impairment; investigation of accidents; maintenance of safety for employees, customers, clients, or the public at large; maintenance of productivity; quality of products or services; security; or reasonable suspicion that an employee is using drugs and that such use adversely affects job performance or the work environment.[83] As noted in the previous discussion, the only real limitation on

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an employer's action based on a false positive drug test result, since the subjective knowledge of the employer will be nearly impossible for an employee to prove.

78. *See id.* § 23.10.610.

79. *Id.* This lack of guidance is not only detrimental to employees seeking to pursue a claim against an employer for breach of confidentiality in disclosing the results of a drug test, but also leaves remnants of uncertainty for employers who rely on the statute to protect them from litigation based on disclosures.

80. *Id.* § 23.10.600(c)(1).

81. *See id.* § 23.10.600(c)(2).

82. *Id.* § 23.10.620(c).

83. *See id.*

private drug testing in Alaska is the employer's willingness to pay the costs and administrative burdens associated with performing drug tests in accordance with the statute.

Employment actions that employers may take based on the results of drug tests are as unlimited as the reasons for which employers may initiate drug testing programs in the first place.[84] For example, the employer can require that the employee attend counseling or rehabilitation or be subject to suspension and termination.[85] In the case of applicants, the employer can refuse to hire any applicant testing positive for drug use.[86] In addition, the employer may take an adverse action based on the employee's refusal to provide a drug testing sample.[87] The statute thus provides a plethora of protections for employers willing to incur the financial and administrative burdens inherent in complying with the Act.

3. *Employer Burdens*. The primary burden the Act imposes is the increased financial and administrative costs required to comply with the law.[88] Employers must pay all costs associated with drug testing, including compensation for time taken by employees to be tested, the costs of multiple drug tests for employees before they can be terminated, and any additional costs associated with on-site testing.[89] Employers must also pay an MRO to review and discuss test results with employees and to provide substance abuse training to one designated employee.[90] Furthermore, employers must bear the administrative burdens associated with creating the written policy, complying with the terms of the policy, and providing adequate notice of the policy to employees.[91]

The intangible costs of complying with this Act include the uncertainty created by vague portions of the Act that do not completely reassure employers that they are shielded from litigation.[92] In addition, the statute limits an employer's use of drug tests to urinalysis, which is more expensive, more difficult to

84. *See id*. § 23.10.655(b).
85. *See id.* § 23.10.655(b)(1)-(3).
86. *See id.* § 23.10.655(b)(4).
87. *See id.* § 23.10.655(a)(2).
88. *See supra* notes 38-71 and accompanying text.
89. *See id.*
90. *See supra* notes 55-56 and accompanying text.
91. *See supra* notes 38-42 and accompanying text.
92. *See supra* notes 75, 78-83 and accompanying text. This uncertainty could lead to further financial costs if consultation with lawyers becomes necessary.

administer and more intrusive than other forms of drug testing.[93] The Act creates additional uncertainty by giving HHS (and for on-site testing, the FDA) authority over Alaskan employers in testing for drugs for which HHS has established cutoff levels, while failing to provide what those levels are or how employers can go about finding them.[94] Thus, while offering valuable employer protections, the Alaska Legislature has simultaneously created a series of regulations limiting employers' ability to conduct their drug testing programs, and thus their businesses, as they see fit.

B. The Employee's View of Alaska Statutes Sections 23.10.600-99

1. *Employee Protections*. The primary protection afforded employees by drug testing legislation, according to drug testing proponents,[95] is that all employees will benefit from the increased safety and health in the workplace. This argument assumes that drug testing in fact improves workplace safety and health,[96] and that without this legislation employers would not test for drugs. Yet, this legislation was motivated in part by concerns about fairness in independent employer drug testing. The Act therefore benefits employees more directly by requiring that employers use uniform, scientifically acceptable testing procedures, perform confirmatory tests of all positive results using a more reliable method, and have all results screened and communicated by an MRO.[97]

Similarly, employees benefit from the written policy requirements because they provide notice to employees that they are subject to drug testing, and they specifically detail the components of the drug testing program, including the consequences of a positive drug test.[98] The Act's requirement that

93. *See supra* notes 47-49 and accompanying text. This limitation may be a wise one, although burdensome, because other forms of drug testing are more controversial than urinalysis. *See Federal Workplace Drug Testing*, *supra* note 49.

94. *See supra* notes 58-59 and accompanying text.

95. *See Hearings*, *supra* note 11 (noting that the Private Sector Drug-Free Workplace Act is pro-employee because it promotes workplace safety and health, which is "an even more significant benefit" than the increased responsibility in employer testing).

96. While employees do benefit from safer and healthier workplaces, it is still not clear that drug testing programs achieve such lofty goals. The research for this Note could uncover no study aimed directly at the amount of accidents in the workplace before and after the institution of a drug testing program.

97. *See supra* notes 43-56 and accompanying text.

98. *See supra* notes 38-42 and accompanying text.

the employer have a trained on-site delegate to recognize substance abuse and determine whether reasonable suspicion exists to require individual drug testing further protects employees against an employer's abuse of discretion in testing for any job-related reason consistent with business necessity.[99] Finally, the Act protects employee interests by emphasizing the need to protect employee privacy during testing (to the extent reasonably possible, considering the invasive nature of urinalysis)[100] and by explicitly stating that information related to drug testing results are to be kept confidential.[101]

2. *Potential Problems for Employees*. Despite the statutory protections described above, the Act does not appropriately balance the employers' interests with the employees'. The primary problem drug testing presents for employees is the invasion of privacy necessitated by the collection of the sample and the related disclosures required at the time of testing.[102]

The collection of a urine sample is the most obvious intrusion on employee privacy. The Alaska Legislature addressed this issue by stating that "[s]ample collection shall be performed in a manner that guarantees the individual's privacy to the maximum extent consistent with ensuring that the sample is not contaminated, adulterated or misidentified."[103] Because this language does not prevent an employer from using his or her discretion to require a witness to observe collection of the urine, the provision does little to guarantee the employee any privacy. The collection of a urine sample poses an additional privacy concern in that the sample provides the employer with confidential information unrelated to drug use.[104] Indeed, a major flaw in the Act is that it contains no

99. *See supra* notes 84-87 and accompanying text; *see also supra* note 57 and accompanying text. It is arguable, however, whether the combined 120 minutes of training this employee receives in drug and alcohol abuse can sufficiently protect the employee interests. Furthermore, this employee might still be subject to the employer's influence in deciding whom to individually drug test, negating any tangible benefit to employees in serving as a check on an employer's malicious behavior.

100. *See infra* note 111-133 and accompanying text.

101. *See* ALASKA STAT. § 23.10.660 (LEXIS 1998). The protection afforded employees by this provision is limited by the lack of language indicating that breaches of confidentiality will result in a loss of the protections of the act. *See infra* notes 117-127 and accompanying text.

102. *See* ALASKA STAT. §§ 23.10.630-40.

103. ALASKA STAT. § 23.10.630(c).

104. An employer could test a urine sample to determine if an employee were pregnant, or had AIDS or diabetes, for example.

provision prohibiting employers from testing the samples for other conditions or use of substances other than illegal drugs.[105] Although employers may be discouraged from testing for these additional conditions by the ADA,[106] and because of the added expense such tests would entail, the Alaska Legislature should have required employers seeking the protection of the Act to refrain from testing for other conditions or for substances besides illegal drugs. Such a provision would have provided Alaska employees with vital protection of their state constitutional right to privacy,[107] while only slightly restraining the actions of employers.[108] The Act should also provide protection against such action by allowing employees recourse to either internal grievance procedures[109] or the courts (as the ADA might require)[110] if the employer does test the sample for substances or conditions other than illegal drug use.

Requiring an employee to submit to drug testing necessarily entails the disclosure of current medical conditions and identification of any current or recently used prescription or non-prescription drugs. As such, the mandated testing is a further invasion of employee privacy.[111] The statute requires the employee to have the opportunity to provide this information to the MRO or to the person collecting the sample, and does not directly require it to be given to the employer. However, it is not clear from the

105. *See* ALASKA STAT. §§ 23.10.600-99. C*f.* ARIZ. REV. STAT. § 23-493.09 (1998).

106. *See* 42 U.S.C. § 12112(a). An adverse employment action taken on the basis of a medical condition discovered through a drug testing sample would be discrimination on the basis of a disability, in violation of the statute; s*ee also supra* notes 32-34 and accompanying text.

107. *See* ALASKA CONST. art. I, § 22; *see also supra* notes 15-21 and accompanying text.

108. The only employer action restrained would be the unethical action of testing an employee's sample for conditions and substances other than illegal drugs.

109. A provision mandating employers to set up grievance procedures to deal with drug testing issues would be a valuable compromise for both sides. Employees would be able to have their grievances with the drug testing program heard and perhaps rectified, and employers would still avoid expensive litigation.

110. To truly protect an employee's vital privacy right, employees should have a private right of action against employers who breach their privacy in such a grievous manner, aside from an action under the ADA.

111. *See* ALASKA STAT. § 23.10.640(a) (LEXIS 1998).

statute whether the employer will have access to this information.[112] Although employees may decline to provide this information, they will be denied the benefit of having the test result reported as negative if the medication they are using may have caused the positive result.[113] This condition unfairly places employees in the position of having to choose to keep their medical information private, risking a positive result based on a medical condition or prescription drug, or to disclose private information that might indirectly be shared with the employer. Such private information could then be used by the employer to justify an adverse employment action, leaving the employee with no recourse to internal grievance procedures or the courts.[114] Moreover, placing employees in this compromising position is further objectionable when on-site urinalysis is conducted by a delegate of the employer.[115] Employees would then be forced to provide confidential information to the delegate, a fellow employee, in order to account for a possible positive test result caused by the use of prescription medication or a medical condition. Such a procedure is a further unwarranted intrusion into employees' private lives.[116]

Although section 23.10.660 specifically deals with confidential information, this section, like the rest of the Act, lacks any practical recourse for employees who suffer a breach of confidentiality by their employers.[117] This provision states that "a communication received by an employer relevant to drug test or alcohol impairment test results and received through the employer's testing program is a confidential and privileged communication and may not be disclosed"[118] except to listed individuals, including courts or governmental agencies.[119] However, the statute does not specify

112. *See id*. (indicating only that "the person collecting the sample . . . provide the person to be tested with an opportunity to provide medical information that may be relevant to the test").

113. *See id.* § 23.10.640(d)(3) (requiring the physician reviewing the test results to "report test results that have been caused by prescription medication as negative").

114. For example, an employer could discharge an employee who disclosed prior to a drug test the use of drugs to treat HIV.

115. *See id*. §§ 23.10.645-50.

116. *See id.* There is little left of the "confidentiality" mandated by the statute when an employee must disclose information not only to a worker at an independent lab, or to the employer, but also to a fellow worker whom that employee must face, and in some cases, supervises the employee.

117. *See id*. § 23.10.660; *see also supra* notes 67-68 and accompanying text.

118. ALASKA STAT. § 23.10.660.

119. *See id*.

the consequences for employers who violate this provision.[120] While employers should be subject to litigation in the event of a breach of confidentiality, section 23.10.610, which limits causes of action for disclosures, negates this possibility.[121] It bars actions for defamation of character, libel, slander, or damage to reputation except when related to a negligently disclosed false positive test result.[122] The language of the statute indicates that causes of action for any other disclosure will not be allowed, even though such a disclosure necessarily entails violation of the confidentiality mandated in section 23.10.660.[123] By removing legal remedies for these violations of employee privacy, the Alaska Legislature has left employees to rely on their employer's good faith that drug testing samples will be used appropriately. Without recourse to the courts[124] or even a provision requiring an internal grievance procedure for drug testing violations,[125] the provision mandating confidentiality of employee information is meaningless.

The statute also leaves employees vulnerable to the threat of criminal action, since even confidential communications may be disclosed when ordered by a court or governmental agency.[126] The Legislature could have provided employees with stronger protection (and stronger incentive for submitting to the test rather than risking termination for a refusal to submit) by preventing the test results from being used in any court actions except those directly based on the results of the test.[127] This provision would have provided important protections for employees required to submit to drug testing as a prerequisite to employment, and it would have had no effect on the protections afforded the employers. In fact, a provision limiting the use of test results in other court actions would aid employers by keeping them out of litigation unrelated to their businesses, such as for testimony relating to the prosecution of a former employee on drug charges.

Additionally, because the Act allows employers to perform random, suspicionless drug testing, as well as testing of individuals

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120. *See id; see also supra* notes 67-68 and accompanying text.

121. *See* ALASKA STAT. § 23.10.610.

122. *See id*; *see also supra* notes 76-81.

123. *See id*. §§ 23.10.610, 23.10.660.

124. *See supra* note 109.

125. *See supra* note 110.

126. *See* ALASKA STAT. § 23.10.660(3).

127. Other legislatures have provided stronger protections. *See* ARIZ. REV. STAT. § 23-493-09 (1998); UTAH CODE ANN. § 34-38-13 (1998); *see also infra* notes 132-153 and accompanying text.

suspected of impairment,[128] unscrupulous employers may abuse their authority to harm particular employees. The employer could use confidential drug testing information to subject employees to criminal drug prosecution, to jeopardize an employee involved in a child custody dispute, or to threaten the employee's ability to obtain other employment.[129] Because the statute does not require company management to be tested along with employees,[130] the threat of abuse of discretion by employers is even greater. Employers have nothing to lose in this drug war, aside from the costs of testing. Employees, however, must simply accept their employers' word that they will keep medical and drug use information confidential, and that they will not intervene in their employees' other private affairs by offering drug test results to courts and governmental agencies. Employees are being asked by the Alaska Legislature to rely far too much on an employer's good faith. The Legislature could have balanced the employers' and employees' interests better by enacting a few additional protections for employees — without causing harm to employer interests.[131]

IV. OTHER DRUG TESTING LEGISLATION

Other states' statutes with the same goals of regulating the use of drug testing in the employment context balance the parties' interests more equitably. Arizona's and Utah's statutes were based on the President's Commission on Model State Drug Laws, as was Alaska's, but the Alaska statute neglected to adopt some of the core provisions protecting employees that the Arizona and Utah statutes include.[132] The Alaska statute is also lacking in many respects when compared with similar federal statutes, both proposed and enacted. This section of the Note will compare the core provisions of other state and federal drug testing statutes with those enacted in Alaska.

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128. *See* ALASKA STAT. § 23.10.620(c).

129. While the Act prohibits such voluntary disclosures by employers, the lack of sanctions for unauthorized disclosures leaves unscrupulous employers little reason to abide by this prohibition.

130. Other legislatures have required equal treatment of company management. *See infra* notes 140, 145 and accompanying text.

131. Again, other legislatures and lawmakers have seen fit to add such protections. *See infra* notes 133-153 and accompanying text.

132. *See Hearings, supra* note 35 (noting that the Private Sector Drug-Free Workplace Act embraces "concepts of the legislation endorsed by the President's Commission on Model State Drug Laws . . . . and enacted into law in Alaska, Arizona, Idaho and Utah").

A. The States: Utah and Arizona Drug Testing Statutes

Both the Utah "Drug and Alcohol Testing" statute,[133] enacted in 1987, and the Arizona "Drug Testing of Employees" statute,[134] enacted in 1994, contain language substantially similar to the Alaska Act.[135] However, the Utah and Arizona statutes are more clearly organized than the Alaska Act, and, in many instances, use clearer language.[136] The most significant difference is that the Alaska Act is lacking in some of the core employee protection provisions available in the other acts.

The Utah statute makes clear at the outset that the statute is not intended to prohibit any employee from seeking damages or job reinstatement for actions taken based on false drug test results.[137] However, much like the Alaska Act, monetary damages are not available if the employer's reliance on the false test result was reasonable and in good faith.[138] It is not clear whether Alaskan employees may similarly seek job reinstatement. The Alaska statute, which also limits damages, including monetary damages, does not refer to job reinstatement at all.[139] The Utah statute also extends to employees an intangible protection by requiring "[e]mployers and management in general" to submit to the testing themselves "[o]n a periodic basis."[140] This requirement creates a presumption that the tests will be administered fairly.

The final significant difference between the Utah statute and the Alaska statute is that the Utah statute explicitly states that all information, interviews, reports, statements, memoranda, or test results are confidential.[141] Such information "may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding" except those relating to an adverse employment action taken by an employer under the statute.[142] The

133. *See* UTAH CODE ANN. §§ 34-38-1 to 15 (1998).

134. *See* ARIZ. REV. STAT. §§ 23-493.01 to 11 (1998).

135. *See* ALASKA STAT. §§ 23.10.600-99 (LEXIS 1998).

136. *See id*. § 23.10.600. *Cf.* ARIZ. REV. STAT. §§ 23-493.06 to 07; UTAH CODE ANN. §§ 34-38-9 to 11. The Arizona and Utah statutes are better organized as a whole because they begin with purposes and findings, then indicate testing procedures, followed by the protection from litigation sections. This makes better intuitive sense than Alaska's organization, which begins with litigation limitations, then the testing procedures, and lacks a purposes or findings section.

137. *See* UTAH CODE ANN. § 34-38-1.

138. *See id.* § 34-38-10.

139. *See* ALASKA STAT. § 23.10.600-10.

140. UTAH CODE ANN. § 34-38-3.

141. *See id.* § 34-38-13(1).

142. *Id*.

Utah Legislature wisely recognized that inclusion of this provision provides a crucial protection to employees, while it in no way limits the rights of the employer. The Utah Legislature also provided protection to the employer by indicating that the employer may not be called as a witness under the Act unless the employer's adverse employment action precipitates the proceeding.[143] The Utah Legislature ensured that the drug testing encouraged by the statute would serve its purpose of decreasing workplace problems, rather than negatively affecting the employment relationship.

The Arizona Legislature provided many of the same protections offered by the Utah Legislature.[144] The Arizona statute, like the Utah statute, requires that "all compensated employees including officers, directors and supervisors shall be uniformly included in the testing policy."[145] The Arizona Legislature also made confidential all communications relevant to drug test results. Such status requires that they not be used as evidence, obtained in discovery, or disclosed in any proceeding except one related to an adverse employment action taken by an employer under the drug testing statute.[146] The Arizona Legislature went even further in protecting employee privacy by adding the provision that "[e]xcept as otherwise permitted by law, no sample taken for testing pursuant to this article shall be tested for any substance or condition except unlawful drugs or alcohol."[147] This provision prevents a further invasion of privacy after a sample has been collected for drug testing — the threat that the employer may learn an employee's confidential medical information, information that the employee may not even yet be aware of in some cases.[148] Although the ADA may prohibit such conduct on the part of employers,[149] and employers may find it "expensive and unnecessary" to conduct extra testing of employee samples,[150] a provision prohibiting such conduct is still necessary and desirable

143. *See id.* § 34-38-13(4).

144. *See* ARIZ. REV. STAT. §§ 23-493.01 to 11 (1998). *Cf.* ALASKA STAT. §§ 23.10.600-99; UTAH CODE ANN. §§ 34-38-1 to 15.

145. ARIZ. REV. STAT. § 23-493.04.

146. *See id*. § 23-493.09(A).

147. *Id.* § 23-493.09(C).

148. *See id.; see also supra* note 104.

149. *See supra* notes 32-34 and accompanying text.

150. Testimony given in relation to the Drug Free Workplace Act of 1998 is instructive here, as it applies equally to state legislation on drug testing. *See* H.R. 584, 105th Cong. (1998) (codified in 15 U.S.C. § 654 (1999)) ("Several of the employer witnesses testified [before the House] that they do not and would not test beyond drugs and alcohol. Such testing is expensive and unnecessary.").

to provide additional assurance that this privacy violation will not occur.

While both the Utah and the Arizona statutes protect employee privacy more than the Alaska statute, both statutes still fail to enact legislation that offers the fairest compromise between the privacy rights of employers and employees. Both statutes protect the confidentiality of drug testing information through explicit provisions, but fail to provide any recourse for employees who suffer a breach of confidentiality.[151] Because each statute requires employers to refrain from disclosing confidential information, they should also provide the victims of disclosures some cause of action, whether through internal grievance procedures or the legal system. At the very least, the Legislatures could have mandated that a breach of confidentiality relating to drug testing forfeits the protection provided by these acts, just as failure to follow the testing and administrative procedures forfeits the protections of these acts. The failure of the three state legislatures to fully and effectively protect employee privacy rights indicates that each failed in its goal to create legislation that ensures "the preservation of privacy and dignity"[152] of employees and "fair and equitable testing for drugs and alcohol in the workplace."[153]

B. The Federal Government: The Drug-Free Workplace Act of 1998 and the Private Sector Drug-Free Workplace Act

The Drug-Free Workplace Act of 1998[154] (the "1998 Act") is the small business counterpart to the Drug-Free Workplace Act of 1988[155] (the "1988 Act"), which required implementation of drug-free awareness programs for federal contractors and grant recipients. The 1998 Act differs from the 1988 Act in that it earmarks $10 million for the Small Business Administration for grants to contract with not-for-profit organizations in order to provide small businesses with drug-free workplace programs.[156] The 1998 Act goes further than the 1988 Act, requiring such programs to include a written policy prohibiting certain substances in the workplace, two hours of substance abuse training for employees, additional training for employees who are parents,

151. *See* ARIZ. REV. STAT. § 23-493.09; UTAH CODE ANN. § 34-38-13 (1998).
152. 1994 Ariz. Legis. Serv. 246, § 1 (West).
153. UTAH CODE ANN. § 34-38-1.
154. *See* H.R. 105-584.
155. *See* 41 U.S.C. §§ 701-707.
156. *See* H.R. 105-584.

employee access to an employee assistance program, and employee drug testing.[157] The 1998 Act mandates that small business employers administer drug tests through a laboratory approved by the HHS, and that positive results be confirmed and reviewed by an MRO.[158] Because the 1988 Act does not make any reference to drug testing,[159] the 1998 Act marks the first time Congress has indicated, on a federal level, that employers may request federal funds for the purpose of instituting drug testing programs in private workplaces.[160] Although compliance with this statute is voluntary, businesses that decide to comply must provide the entire range of programs mandated in the statute, restricting the ability of small businesses "to tailor a program that meets their needs."[161]

While the House Committee on Small Business adopted this statute, the minority views of committee Democrats indicated that the 1998 Act, like the Alaskan drug testing statute, "still sorely lacks employee protections."[162] Additionally, the minority committee members recognized that the bill contains no clear procedural guidelines for handling situations where employees test positive or voluntarily come forward with drug abuse problems.[163] The minority committee members further indicated that the testing provisions were "extremely vague," allowing for "controversial methods of testing [such] as hair samples," which "will not foster a drug-free work place, but create an environment filled with tension and uncertainty between employees and supervisors."[164] The Alaska Legislature, unlike the federal government (or the Utah or Arizona Legislatures), wisely avoids the controversial use of hair, sweat or saliva testing.[165] However, the Alaska statute still helps to foster the tension-filled environment the minority committee members warned against by not testing supervisors and others in

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157. *See id.*

158. *See id.*

159. *See* 41 U.S.C. §§ 701-707 (1998); *see also* Parker v. Atlanta Gas & Light Co., 818 F. Supp. 345 (S.D. Ga. 1993) (noting that the Drug-Free Workplace Act did not mandate drug tests).

160. *See* H.R. 105-584.

161. *Id*. (minority views).

162. *Id*.

163. *See id.*

164. *Id.*

165. *See* ALASKA STAT. § 23.10.699 (LEXIS 1998) (defining "sample" to include only breath or urine). *Cf.* ARIZ. REV. STAT. § 23-493 (1998) (defining "sample" to include urine, blood, breath, saliva, hair or other substances from the person being tested); UTAH CODE ANN. § 34-38-2 (1998) (defining "sample" to include urine, blood, breath, saliva or hair).

active control of the business.[166] The 1998 Act, in contrast, defines "employee" to include supervisors, managers, and owners and officers active in management of the business, so that these individuals must be drug tested as well, which lessens the tension the Act creates in the work environment.[167] The enacted version of the 1998 Act better protects employee privacy than the Alaska Act by prohibiting the mandatory disclosure of medical information by an employee prior to a confirmed positive test, and requires that the MRO only report "final results, limited to those drugs for which the employee tests positive."[168]

The Act contains more detail on drug testing procedures than the Drug-Free Workplace Act of 1998. This greater detail results in stronger protection for employees from unfair testing procedures. However, the Act suffers from vagueness in the provisions limiting the tort rights of employees.[169] From the language of the statute it is not clear what remedies employees whose rights are violated by drug testing may seek, or if they are simply barred from pursuing any cause of action related to drug testing.[170]

The proposed Private Sector Drug-Free Workplace Act[171] (the "Proposed Act"), if passed, would be the federal counterpart to the Act. The statute would, in fact, preempt the Alaska statute, subjecting Alaskan employers to the will of the federal government on this issue.[172] The Proposed Act would also preempt any other federal or state law

> that applies to the hiring, employment, continued employment or reemployment in a sensitive position of a drug addict, recovering drug addict, drug abuser, alcoholic, recovering alcoholic, or alcohol abuser, or to the reinstatement or rehiring of any employee in a safety-sensitive position . . . that has produced a confirmed "positive" [drug- or alcohol-test] result.[173]

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166. *See* ALASKA STAT. § 23.10.699 (defining "employee" as a person in the service of an employer). One could argue based on this definition that a supervisor is in the service of an employer; however, an owner/manager would not be. The Alaska Legislature should clarify this ambiguity with an explicit provision regarding supervisors, owners, and officers.

167. *See* H.R. 105-584.

168. 15 U.S.C. 654(c)(2)-(3) (1999).

169. *See* ALASKA STAT. §§ 23.10.600-10.

170. *See id*; *see also supra*, notes 72-81, 121-125 and accompanying text (detailing ambiguities in litigation limitation sections).

171. *See* de Bernardo, *supra* note 35.

172. *See id.*

173. *Id.*

This provision may eliminate the ADA as a source of protection for recovering substance abusers who are refused jobs based on stereotypes about the abilities of recovering substance abusers.[174] The provision may also eliminate use of the ADA to prevent employees from revealing private medical information in relation to drug tests.[175] At the same time, state legislatures would be barred from preventing drug testing, despite legitimate concerns that state legislatures might have about the unreliability and invasion of privacy inherent in such methods of detecting drug users. State lawmakers would be denied the opportunity to set the laws of their states according to the values of the people who reside there, and would be prevented from limiting drug testing according to the needs of its employer community. For example, since the Proposed Act defines "sample" as "any sample of the human body capable of revealing the presence of alcohol or other drugs or their metabolites,"[176] the Alaska Legislature would be forced to tolerate federal protection to employers who use hair testing, despite its judgment that such testing has not proved reliable or appropriate for Alaskan employers.[177]

Despite the many drawbacks of the Proposed Act, it does provide an immeasurably valuable protection to employees that is absent from the Alaska, Utah, or Arizona statutes. The Proposed Act explicitly sets out the employer's responsibility to adhere to all its terms in order to retain its protections: "The employer's use and disposition of all drug or alcohol test results are subject to the limitations of this Title if the employer is to qualify for the legal

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174. This is a concern especially when considering section 10 of the proposed Act, which would permanently exclude those who test positive for drugs from employment in broadly defined "safety-sensitive" positions. *See id*. Another proposed statute, the Public and Employee Safety Assurance Act, also presented to Congress during the testimony of Mr. de Bernardo, would allow employers to exclude both those who test positive for drugs and those "with a history of substance abuse" (also broadly defined) from employment in the same broadly defined "safety-sensitive" positions. *See id*. This could violate the ADA, were it not for similar preemption language in that statute.

175. *See* Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221 (10th Cir. 1997) (successfully challenging under the ADA required disclosures of confidential medical information in relation to an employer's drug testing program); *see also supra* notes 32-34 and accompanying text.

176. de Bernardo, *supra* note 35.

177. *See* ALASKA STAT. § 23.10.699 (LEXIS 1998). Assuming, in the absence of legislative history, that if the legislature had found hair, saliva, or sweat testing methods reliable or appropriate, it would have altered the definition of "sample" to include those methods.

benefits and protections available under this Title."[178] Among other things, this provision provides an incentive for employers to retain confidentiality of information relevant to drug testing. The Act also prohibits, in language identical to that in the Utah and Arizona statutes, the use of drug test results in evidence, and disclosure during discovery or in any public or private proceeding except that related to an adverse employment action taken by an employer under the Proposed Act.[179] With these several provisions, the federal drug testing statute manages to provide a much better balance of employer interests with the privacy right of employees.[180]

V. POLITICS, POLICY, AND CONCLUSIONS

In 1982 President Ronald Reagan initiated the War on Drugs, commenting in a radio address that "We're making no excuses for drugs — hard, soft, or otherwise. Drugs are bad and we're going after them."[181] Thus, drugs, and the fight against them, rapidly became America's prime political obsession, both for politicians and many voters. The fundamental problem with drug fighting as a political issue is that "tough on crime" sentiments such as President Reagan's often preclude rational debate on drug policy. Most critical examination of the extent of the drug problem in the United States was conducted by government-sponsored commissions or task forces, which had an admitted agenda to "go after" drugs.[182] Thus, there has been an extreme lack of reliable, unbiased information on drug use. This unreliability stems from a refusal to identify the governmental source of much of the information on drug use available to the public, a failure to define the terms used in reporting results of surveys, the failure to explain

178. de Bernardo, *supra* note 35.

179. *See id*.

180. *See id*.

181. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987) (quoting the President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249 (Oct. 2, 1982)); *see also* Staci O. Schorgly, Note, *Sacrificing the Fourth Amendment in the Name of Drugs*: State v. Damask, 66 UMKC L. REV. 707 (1998).

182. *Id.; see also* DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 199, 119-21 (June 1997) (noting that former drug czars under President Reagan believed drug agencies "should promote the ideas of the people who paid them: the administration in power") (also noting the partnerships of independent parent-drug information organizations with federal drug policymakers under the Reagan administration).

the conditions under which such surveys were produced, and the failure to distinguish among various drugs.[183]

One potent example of this phenomenon in the drug testing arena is a widely quoted statistic indicating the "costs" of drug abuse to the American workforce. In 1998, this figure was cited as $60 billion by an Ohio Representative,[184] and increased to $75 billion when Mr. Mark de Bernardo, the Executive Director of the Institute for a Drug-Free Workplace, testified before the House of Representatives.[185] The Alaska Supreme Court, writing in 1989 in *Luedtke v. Nabors Alaska Drilling*,[186] cited the figure as between "$60 billion and $100 billion per year"[187] and noted that a 1988 survey put the cost at more than $100 billion per year.[188] A survey on the National Institute for Drug Abuse's Internet web site indicated that 1995 estimates for the economic effects of drug abuse are $109.8 billion.[189] None of the sources citing this elusive statistic, not even the *Luedtke* court's opinion,[190] contained any further indication of what study this figure was derived from or how these costs were determined. Also lacking in this statistic is important information about what exactly was studied, under what conditions the study was conducted, and which drugs were involved

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183. *See id*.

184. *See* Lisa Finnegan, *Crack Down on Drugs*, OCCUPATIONAL HAZARDS, September 1, 1998, *available in* 1998 WL 15157543 (1998). Finnegan states, "[Representative] Portman [R-Ohio] said illegal drug abuse costs American businesses more than $60 billion every year in managed claims, accident costs, and lost productivity." *Id.*

185. *See* de Bernardo, *supra* note 35.

186. 768 P.2d 1123.

187. *Id*. at 1139 (Matthews, C.J., concurring) (*citing* Richard N. Cook, Note, *Drug Testing of Public and Private Employees in Alaska*, 5 ALASKA L. REV. 133, 133 (1988)).

188. *See id*. (*citing* N.Y. TIMES, Dec. 12, 1988 (Business Section), at 1).

189. The NIDA study calculated this figure by using 1992 estimates and projecting them upward for increased population growth and price changes, without considering the incidence and prevalence of alcohol and drug problems during the period from 1992 to 1995. One wonders what purpose this statistic serves when it fails to indicate whether it considers drug and alcohol problems in the workplace in addition to general problems arising from drug and alcohol abuse. It is also remarkable that from 1988 to 1998, the estimated costs of drug abuse to American business could fluctuate from $100 billion, to $75 billion, and back up to $109 billion.

190. The court cites to Cook, *supra* note 187, which in turn cites to Castro, *Battling Drugs on the Job*, TIME, Jan. 27, 1986, at 43. This article cites to "a study released by the Research Triangle Institute in June 1984," presumably the same study sponsored and published by the NIDA, *supra* note 189. *Id.*

in the study — all crucial to understanding what is at stake in the fight against illegal drugs.

Not only is this statistic uninformative, but upon further examination, it is revealed to have a dubious scientific basis.[191] An article by John Horgan in the *New Republic* provides the following insight:

> In 1982, the NIDA [National Institute on Drug Abuse] surveyed 3,700 households around the country. The Research Triangle Institute (RTI), a NIDA contractor in North Carolina, then analyzed the data and found that the household income of adults who had *ever* smoked marijuana daily for a month (or at least twenty out of thirty days) was twenty-eight percent less than the income of those who hadn't. The RTI analysts called this difference "reduced productivity due to daily marijuana use." They calculated the total "loss" when extrapolated to the general population, at $26 billion. Adding the estimated costs of drug-related crimes, accidents, and medical care produced a grand total of $47 billion for "costs to society of drug abuse."
>
> Several things are wrong here, but the most glaring error is the simpleminded conclusion that marijuana smoking caused the lower incomes with which it was associated [since] mere correlation never establishes causality.[192]

This study is scientifically faulty because it rests on the mere correlation of ever having used marijuana regularly and lower income. It is too narrowly focused on marijuana to justify its application to all drugs, and it also is not clear that an appropriate cross section of society was in the sample. Even if an appropriate sample of American households were surveyed, there is not even a single glance into the nation's workplaces to determine what the actual costs of drug abuse are, even though this statistic has been used to convey the cost of drug abuse to American businesses. The researchers involved with the study apparently recognized the limitations of their study, because they noted

> [e]stimates from this study are generally comparable to those produced by prior major studies on the economic impact of drug and alcohol abuse. Although literally hundreds of differences have occurred from study to study[,] . . . it is fair to say that generally similar methodological approaches have been applied. . . . The major cause of variation across the five studies is *reduced productivity*.[193]

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191. *See* John Horgan, *Your Analysis is Faulty (How to Lie with Drug Statistics)*, THE NEW REPUBLIC, Apr. 2, 1990.

192. *Id*. (emphasis added); *see also* Baum, *supra* note 180, at 230-31.

193. National Institute on Drug Abuse, *The Economic Costs of Alcohol and Drug Abuse in the United State – 1992* (visited Oct. 28, 1999) <http://www.nida.nih.gov/EconomicCosts/Chapter 1.html> (emphasis added).

In the "Impaired Productivity" section of the study, the researchers recognized that

> [a]n estimated $82 billion in lost potential productivity was attributed to alcohol and drug abuse in 1992 ($67.7 billion and $14.2 billion, respectively). This accrued in the form of work not performed — including household tasks — and was measured in terms of lost earnings and household productivity. *These costs were primarily borne by the drug or alcohol abusers and by those with whom they lived. . . . This study has not attempted to estimate the burden of drug and alcohol problems on work sites or employers, nor should the estimates in this study be interpreted in this manner.*[194]

It is not clear why impaired productivity is factored into the estimates for costs to employers for drug abuse, resulting in so much variation among the different studies attempting to quantify the costs of drug abuse to employers. Further, the NIDA study focused on costs to society, not necessarily to American employers, and included such factors as motor vehicle crashes, premature death, crime, social welfare, along with the elusive impaired productivity standard.[195] The only factor logically transferred to employers is the cost of health care expenditures, approximated at $9.9 billion, $4.4 billion of which was for specialized services for treatment of drug problems, generally not incurred by employers.[196] Thus, this study rests mainly on factors not related to employer's costs.[197] Because those who have cited this statistic have failed to indicate upon which study they are relying, the public has no way to examine the studies and determine whether they are adequate premises from which to begin a discussion of appropriate drug policy for the nation's workforce. Even more distressing, with all of the studies attempting to quantify the "costs" of drug abuse to employers, none have attempted to look at the actual number of

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194. *Id.* (emphasis added).

195. *See id.* It is remarkable that factors indicating impaired productivity due to drug abuse included "household tasks" as a criterion, the more so when the figure is then used to indicate the costs to American businesses from illegal drug abuse.

196. *See id*. Many employer health insurance programs that are required to provide mental health services are not required to provide substance abuse or chemical dependency treatment. *See Mental Health Parity Laws by State*, (visited Nov. 2, 1999) <http://www.insure.com/health/mentalstate.html> (noting that neither federal law nor state laws in Arizona, California, Indiana, Louisiana, Minnesota, New Jersey, South Carolina, and Tennessee require health plans to cover substance abuse or chemical dependency treatment).

197. *See id.* (noting that the other studies on the economic impact of drug and alcohol abuse use "generally similar methodological approaches").

accidents in the workplace before or after a drug testing program, not even to demonstrate a mere correlation of drug testing with fewer accidents.[198]

With such inadequate information disseminated to the public by the nation's huge (and expensive) anti-drug campaign, it is hard to accept at face value the need for drug testing in the workplace, especially considering the invasion of privacy such testing necessarily entails.[199] While employment drug testing rests on unproven grounds, it has become the norm in many of the nation's workplaces, from government regulated industries to retail outlets. Until scientifically reliable studies generated by non-government sources demonstrate an actual need for drug testing, employers should continue to rely on their own good judgment as to whether employees are performing at acceptable levels, instead of resorting to drug testing. Voters should tell their legislators to vote against the proposed Private Sector Drug-Free Workplace Act and similar legislation, at least until there are more reliable indicators that such drastic limits on employees' privacy rights are absolutely necessary to achieve safe and effective workplaces. We are entering the realm Justice Marshall warned against in 1989,[200] where fundamental freedoms are sacrificed in the name of an urgent cause, without a single reliable piece of evidence to show that the cause is valid, or that the sacrifices are required on the basis of anything more than stereotypes about the dangers drug abusers present to the American workplace.

Alaska has provided yet another frontier on which the government has played out its War on Drugs despite the state's reputation as "the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states."[201] The character of life in Alaska is further threatened by the use of drug testing by private employers, but there are steps that employers and employees can take to ensure that the work environment is not disrupted by drug testing.

Employers in dangerous industries may find drug testing the only appropriate way to prevent accidents and increased health insurance costs. Those employers should not only adhere to the

198. If these studies have been conducted, they do not seem to have been published — at least my research has revealed no publications on point.

199. *See supra* notes 102-131 and accompanying text.

200. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

201. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975).

Act, but also implement the procedures specified in the provisions that the Legislature failed to include in the statute. For example, employers are encouraged to establish internal grievance procedures for drug testing; to make it company policy not to disclose confidential information related to drug tests, nor to test samples for anything other than illegal drug or alcohol abuse; and to include their supervisors, officers, and themselves, as owners, in their drug testing policy, so that their employees will feel they are being treated as fairly as possible. These minor steps can ensure that the employment relationship remains viable and productive in the face of a drug testing program.

Employees who object to drug testing are encouraged to exercise their rights to find employment that does not require such tests. This is a drastic measure, and perhaps not a feasible option for many, but may be the best way to adequately prevent a program that employees may find morally reprehensible. If employees are unable to take such a measure, they should attempt to unite with their fellow workers in opposition to their employer's drug testing program to encourage their employer to drop such programs, or to refrain from adopting them at all. While this stance is hardly more palatable[202] than changing employment based on drug testing, it is the next best way to voice opposition to drug testing. Employees should communicate their objections to an employer's drug testing policy, especially when changing employment for that reason. Should an employee feel violated by an employer's decision to drug test, employees should take a proactive stance by communicating these concerns to the employer. They should request a forum for employees to voice their concerns prior to the adoption of a drug testing policy. If the policy is already in place, and an adverse circumstance arises in relation to it, the employee should request a hearing or other form of review. Employees should work together with their employers to create a policy that is fair and reasonable, a policy that employers and employees alike can live with. With open communication and careful decision making, Alaskan employers and employees can heed Justice Marshall's warning, and prevent the exigent circumstances of the nation's perceived drug crisis from sacrificing the fundamental freedoms we all cherish.[203]

Mechelle Zarou

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202. Employers and others are likely to consider that those protesting drug testing have something to hide.

203. *See Skinner*, 489 U.S. at 635.