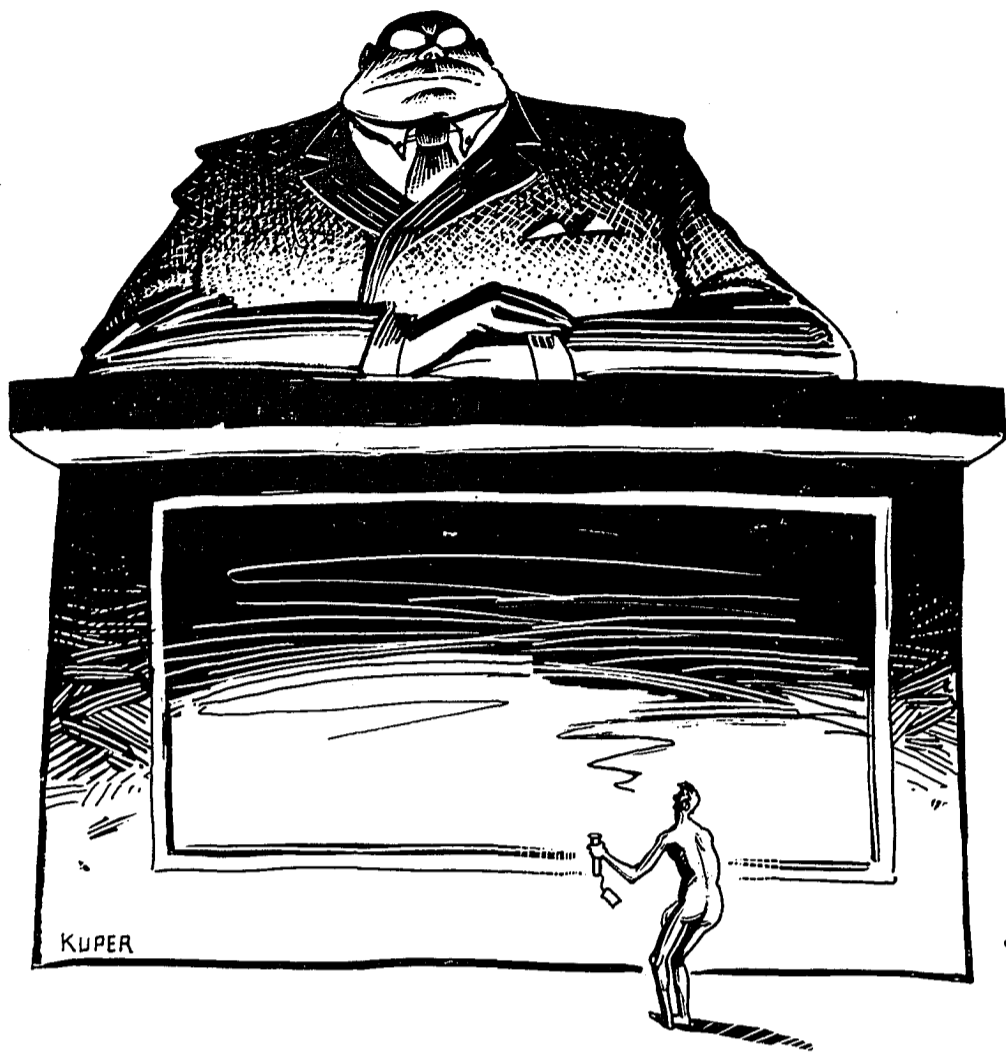


THE COURTS AND THE WORKPLACE



A muddle over drug testing

Uncertainty over laws leaves employers confused, workers disillusioned

By David A. Hoffman

Recent decisions by the US Supreme Court have created the mistaken impression that employers now have a green light to proceed with drug testing of their employees. The reality is more complex, and the laws concerning such testing are in a state of flux at both the state and federal levels.

Although the Supreme Court has interpreted the US Constitution as permitting certain kinds of drug testing, Massachusetts' highest court has parted company with federal precedent and taken a more restrictive approach to governmental testing, based on the state constitution. Meanwhile, Massachusetts legislators are considering a number of bills that would regulate the use of drug testing by employers.

These developments have left many employers and employees uncertain about whether drug testing is forbidden, permitted or required in their workplace. In addition, there is considerable misunderstanding about what drug tests actually show, and considerable reason for disillusionment with drug testing as a means of identifying drug-impaired employees.

Testing increasingly common

What can be said with certainty about drug testing in the workplace at this point?

First, drug testing has become increasingly common. Fifty percent of the Fortune 500 companies now test for drugs; in 1983, that figure was 10 percent. One study of business and governmental employers showed that the vast majority now test job applicants for drugs.

Second, although some federal agencies require testing, most private employers (even those with government contracts) are not required to conduct drug tests of their employees. The recently enacted federal Drug-Free Workplace Act requires employee education but not test-

ing. Even the new Defense Department regulations require contractors to test only those employees in "sensitive" positions.

Third, drug testing is not completely accurate. It not only produces false negatives (i.e., it misses some people who are using drugs) but also gives false positives (i.e., incorrectly identifying people as drug users because of human error or because the person tested had eaten poppy seeds or was present in a room where marijuana was smoked). One recent study reported in the *AMA Journal* found that, even under optimum conditions, laboratories have accuracy rates of only about 95 percent. A false positive is, of course, highly stigmatizing and could permanently derail an individual's career.

Fourth, drug testing is expensive. Most drug testing is done by testing the employee's urine for drug metabolites — first with a rough screening test, then with a more elaborate confirming test. Employers generally must hire lawyers and consultants to design their drug-testing programs, as well as laboratories to administer them and doctors to interpret the results.

Fifth, drug testing is highly intrusive and offensive to employees, most of whom have never used drugs. Some testing programs require that employees be observed while they urinate in order to prevent adulteration of the urine specimens. Employees who are tested must declare any medications they are taking, some of which the employee might wish not to disclose, such as birth-control pills or medication to control epilepsy. Many employers are discovering that employee resentment about the tests, and litigation concerning their legality, are hidden costs.

How effective is it?

Finally, and most important, drug testing is ineffective because it does not measure current impairment. If one of the primary goals of drug testing is to prevent accidents, employers should narrow their focus to those employees who are in high-

ly safety-sensitive positions and use the kind of commercially available equipment that detects current impairment, not off-duty conduct. The National Aeronautics and Space Administration has used this type of testing (which quickly measures an individual's perception, memory and coordination) for its pilots and astronauts for many years. Such tests are less intrusive than urine tests, and have the added advantage of detecting impairment from any source — drugs, alcohol, illness, emotional problems or sleep deprivation.

The legislation that is currently under consideration at the State House is a step in the right direction. Unfortunately, major loopholes remain in some of those bills — e.g., provisions that allow drug testing of all job applicants and all employees in safety-sensitive jobs. Some of the bills do not adhere to the requirement of "probable cause" as the appropriate standard for determining whether an individual employee should be tested.

One hopes that these loopholes will be eliminated, and the Massachusetts courts will continue to recognize that these highly-intrusive tests violate fundamental privacy rights when they are given indiscriminately, without evidence that a particular individual should be tested.

Justice Louis Brandeis once said that our most cherished right is the right to be let alone. Surely, this includes the right not to have samples of our bodily fluids extracted for extensive chemical analysis, and certainly not on a random basis at the whim of our employers.

No one doubts that drug abuse is a serious problem in our society. But the war on drugs must not lead us headlong down a path that erodes our basic privacy rights.

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