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**THE NFL STARCAPS CASE:
ARE SPORTS' ANTI-DOPING PROGRAMS AT A LEGAL CROSSROADS?**

TESTIMONY OF:

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Summary

The very recent decision of the United States Court of Appeals for the Eighth Circuit in *Williams v. National Football League*¹ presents a substantial obstacle to effective anti-steroid or anti-doping testing in the National Football League and other major sports leagues. The decision in effect replaces the testing procedures and the remedies for positive tests that were agreed to as part of the NFL collective bargaining process with those that are provided by the state law of Minnesota. The ramifications from this decision could be far-reaching. Professional sports leagues would be limited to testing procedures and remedies permitted by the state law most lenient to player rights, frustrating the anti-doping movement. As significantly, this decision threatens the competitive balance that lies at the heart of NFL football.

The Williams Decision

The two Williamses are players for the Minnesota Vikings. They are not accused of taking steroids, but instead tested positive in 2008 for the diuretic bumetanide, which is banned by the NFL because it can mask the presence of steroids. The players acknowledged taking an over-the-counter weight-loss supplement sold under the brand name “StarCaps.” The StarCaps label did not state on its label that it contained bumetanide. In response to the positive test, the NFL imposed a suspension of the players for four games each, pursuant to the league’s anti-

¹No. 09-2249, September 11, 2009.

doping policy.² The Williamses then sued the NFL in state court, arguing that the NFL's testing violated Minnesota workplace laws. The case was moved to federal court, where the NFL Players Association then filed suit on the players behalf. The NFL argued in federal court that the state claims should be dismissed on the grounds that federal labor law preempted state law and that uniform national standards are necessary for professional team sports. The federal court dismissed several claims in the Williams' case and sent two claims for damages arising from Minnesota workplace laws back to state court. The state court judge issued an injunction prohibiting the NFL from suspending the players. A trial in state court on the state law claims is currently scheduled for March 8, 2010. The opinion of the Eighth Circuit upholds these decisions by the federal trial court.

My opinion about the Eighth Circuit's decision is both laudatory and critical. On the one hand, the court applies section 301 of the Labor Management Relations Act³ in a predictable manner consistent with many other federal decisions. The LMRA protects the right of workers to unionize. It also establishes a national policy favoring arbitration, rather than litigation, to resolve disputes between labor and management. Section 301 grants to federal courts the jurisdiction to adjudicate challenges to arbitral rulings and related questions.⁴ The Supreme

²The NFL's Policy on Anabolic Steroids and Related Substances was collectively bargained by the NFL and the NFL Players Association.

³29 U.S.C. section 185(a).

⁴Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties."

Court, however, has long interpreted Section 301 to have the more significant substantive effect of preempting law suits based on state law that either enforce the apposite collective bargaining agreement or require its interpretation. Thus, the interpretation and enforcement of the CBA are matters for arbitrators, and their decisions are reviewable by federal courts exclusively.

As long as a question of state law can resolved without enforcement or interpretation of the federally protected collective bargaining agreement, however, then state law will regulate the employment relation of a unionized worker. As a result, business organizations that have operations in more than one state customarily have to adapt certain practices to meet local law, for example with regard to insurance obligations, building codes, or even professional practice. Here, the Eighth Circuit decided the both state law claims could be resolved without enforcement or interpretation of the NFL CBA, and thus refused to deem the claims preempted by federal law. The ruling allows for a trial on the merits of the players' state law claims.

The Unique Nature of the Sports Firm

Despite the straightforward ruling, the decision of the Eighth Circuit panel is open to criticism. The Williams decision is built on a simple premise, and that premise is erroneous, in my view. Professional sports leagues such as the NFL are not a typical multi-state business organizations. They are hybrid business organizations, neither fish nor fowl, and do not easily fit within the mold implicitly anticipated by section 301 and the judicial decisions interpreting it.

The NFL and the other major American professional sports leagues are unique business operations. The NFL requires its franchises to be owned by a single individual or group of

individuals and to be owned locally. In other words, a single owner may not own more than one franchise. This aspect of the business arrangement is designed to provide incentives for local teams to take full advantage of local marketing opportunities for team merchandise and local sponsorships and also do their best to sell game tickets to local fans. Local, individual ownership also gives teams strong incentives to hire and retain the best players and coaches possible, to enhance their chances for on-field success. The NFL relies on local ownership to ensure competitive, enjoyable contests.

Yet the fact that teams are individually owned by local interests does not mean that NFL teams are competitors in a regular business sense. NFL teams compete, but do not wish to drive their competitors out of business. Instead, NFL teams rely on a high degree of cooperation, in both obvious and non-obvious ways. Teams cooperate to create uniform game rules, game schedules, and championship tournaments. They also cooperate to create and sell national and international marketing opportunities, especially broadcast rights, digital media, and national sponsorships.⁵ This obvious cooperation, which is currently under scrutiny by the Supreme

⁵Although this cooperation is currently conducted through collective efforts, it is probably fair to say that such common goods could theoretically be supplied without centralization. For instance, game or tournament promoters could establish rules of play and set a schedule independent of league operations, much as is done in tournament sports such as golf or tennis. Therefore, as a theoretical matter, the NFL could be broken into independent, unaffiliated teams competing against each other, and to that extent could be treated like any other competitive industry. Under this scenario, professional football would appear much different in character than the familiar NFL. In any event, the days of “barnstorming” professional athletic teams is long past, and would seem to present a comparatively inefficient manner to organize team sports in this day of national television networks and worldwide internet access, which together seem to place a premium on national or even international marketing of sports teams and leagues.

Court of the United States in the American Needle antitrust litigation,⁶ masks a deeper co-dependency among teams. Although NFL teams are competitors on the field, off the field they are co-venturers. For the most part, teams do not compete against each other off the field. The Green Bay Packers do not wish to drive the Minnesota Vikings out of business, no matter how angry Packers' fans may be with Minnesota's quarterback. When one franchise does poorly the entire league suffers, even to the extent that professional leagues have been known to take over ailing franchises rather than allow them to fail, as we see currently with the National Hockey League taking over the Phoenix Coyotes franchise. As co-venturers, franchises actively help ensure the financial health and continuing viability of their competitors, devising rules to assist their nominal opponents in hiring high-quality players. Teams ensure the financial health of their on-field rivals by various "parity" rules, such as salary caps, wage scales, luxury taxes, entry drafts, awarding preferential draft and waiver rights to the least-competitive teams, restricting the alienability of draft picks, prohibitions on one-sided trades, weighted schedules, and so forth. In short, the multi-state location of the franchises of a sports leagues tends to mask the nearly complete dependency that teams in fact have on each other to ensure the success of the league.

In my view, the NFL and the other professional leagues are better characterized as a single, national firms,⁷ and not as a number of independent companies that cooperate in small

⁶American Needle v. NFL, 538 F.3d 736 (7th Cir. 2009).

⁷Major League Baseball, the National Hockey League, and the National Basketball Association also have franchises in Canada.

matters such as game schedules or rules of play. But even as single, national firms, the sports leagues have unique needs that require special consideration under the law.⁸ Ordinary single entities that have operations in several states must abide by the respective state laws, for example minimum wage rules and the like. But the NFL differs from the “ordinary single entity” because, although teams are financial co-venturers, they are also on-field competitors. The league relies on competition among its cooperators. As a result, where a state law or other law strikes down a term of employment that directly or indirectly creates competitive balance then the very continuation of the NFL as a business enterprise is threatened. State laws could conceivably be devised to prohibit the player entry draft, or negate the rookie wage scale, or render illegal any restraints on the trade of player contracts, or allow teams to break their contracts to play scheduled games, or declare illegal any revenue sharing or luxury taxes.⁹ Such

⁸In *Wood v. National Basketball Association*, 809 F.2d 954, 961 (2d Cir. 1987) (rejecting player’s challenge on antitrust grounds to league’s salary cap and college player draft), the court stated:

[B]argaining relationships [between professional athletes and their leagues] raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way.

See also *Mackey v. National Football League*, 543 F.2d 606, 619 (8th Cir. 1976)(discussing “the unique nature of the business of professional football”).

⁹One such issue has been resolved by a decision of the Supreme Court. In the spring of 1995, both the City of Baltimore and the State of Maryland passed laws that prohibited use of so-called replacement players during the baseball strike in Camden Yards. Despite state law, the Supreme Court has made it clear that the employer’s rights to use replacement workers under federal labor law preempts any state laws to the contrary. *Golden Gate Transit Corp. v. City of*

decisions might make sense in the context of single, national businesses that happened to have local operations.¹⁰ But in the context of professional sports such applications of state laws would be devastating to the chief product the leagues produce: competitive and exciting game contests.

The Importance of Uniform Doping Standards

One important way that leagues ensure competitive parity is by prohibitions on player doping. Doping is prohibited in part because it allows certain players and their respective teams an unfair advantage over competitors. To preclude unfair advantages, the leagues have imposed anti-doping testing and sanctions. These testing procedures and sanctions may not in all cases comply with the law of the states in which the respective franchises are located.¹¹

Some local competitive advantages are inevitable. The “home field advantage” signifies the collection of attributes or conditions that impliedly assist the home team in winning games, including familiar playing surfaces, cheering fans, familiar routines, and perhaps inadvertently slanted officiating. Yet the leagues even out this inevitable advantage by scheduling teams to an equal number of home and away games.

Los Angeles, 475 U.S. 608 (1986).

¹⁰Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 695 n.9 (9th Cir. 2001). A national employer doing business in multiple states has to cope with different wage laws, antidiscrimination laws, and family leave laws.

¹¹The Appendix to this testimony reviews state laws on one point: workplace drugtesting rules. As that review makes plain, devising a coherent, single policy that satisfies the requirements of all state laws is impossible. The laws differ markedly along many dimensions, including the requirements of notice, the privacy of the drug sample, the cause needed for a test, and the sanctions that result from a positive result.

Professional sports leagues try to eliminate other local advantages more directly.

Financial advantages in the NFL are in part removed by revenue sharing that encompasses nearly all revenue sources. The NFL also imposes a total cap or limit on players' salaries in the aggregate in order to preclude the hiring of all the best players in a few locations. Potential scheduling disparities are reduced by having each team in the same division play an identical slate of opponents from another division. League-wide revenues from broadcast contracts are shared equally among teams.

All of these various league restrictions are imposed, ultimately, for a single purpose: to ensure that rival teams field players that comprise teams of roughly equal ability and skill. The NFL's product is on the field each fall Sunday afternoon. The players play the game, and the game is the entertainment. Numerous NFL policies seek to make sure that the players on each side of the field are roughly commensurate in skill and ability. Most of these policies, such as revenue sharing and draft order, try to create competitive parity indirectly. These policies give teams the wherewithal to hire quality players.

The NFL's anti-doping policy, however, helps ensure a level playing field in a more direct fashion. It prohibits any player from gaining an unfair or undue advantage over another. As a direct means of ensuring on-field competitiveness, the NFL's steroid policy is more important to the NFL's successful ability to field competitive game contests than are the NFL's other parity rules, such as the draft or revenue sharing. It is as vital to competitive balance as restrictions on game equipment or the number of players permitted to a team. It lies at the heart of competitive professional football.

Recommendation to the Congress

Federal law has long recognized the unique nature of the sports firm. Professional baseball has enjoyed an exemption from the reach of the federal antitrust law for approximately a century. Although that decision has been much-criticized by commentators and even circumscribed by an Act of Congress, the Supreme Court has never overruled that decision, and even arguably has extended its scope in recent decades. Similarly, the Congress just a few decades ago allowed nearly all the major professional sports leagues to act as a single entity in negotiating their contracts with television broadcasters. Finally, recent Congresses including this one have taken a particular interest in the anti-doping policies of both professional and amateur sports, recognizing the unique status of sports in the contemporary American culture and the special needs and vulnerabilities of professional sports in matters concerning competitive balance and fair play.

I would urge this Congress to act once again to ensure that the professional sports leagues are able to maintain their paramount goals of competitive balance and competitive integrity. The NFL needs a uniform and national anti-doping policy because the NFL is a single national firm that supplies competitive football games among locally owned franchises. It is a unique business entity.

In my view, there are four possible ways to resolve the problem posed by the decision of the Eighth Circuit.

Option 1. In its next collective bargaining agreement, the NFL could amend its anti-doping policy to meet or exceed the most protective state standards.¹² This approach could satisfy the NFL's need for parity among teams, as all players would be subject to the same restrictions.

There are at least two problems with this possible resolution. First, state law varies widely and is changeable. Although Minnesota appears among the more protective state laws,¹³ another state in which the NFL has or one day will have a franchise could establish more protective standards. As a result, the NFL policy would be implicitly amended by recurring decisions of state legislatures. The appendix to this testimony reviews workplace drug testing statutes from a number of states, most of which are currently home to at least one professional sports franchise. This brief review evidences the great variety of restrictions that states place on workplace drug testing. It would appear difficult, if not impossible, for a particular CBA to articulate a drug testing policy that complied with all potentially applicable state laws.

Second, the testing procedures or sanctions established by one particular state might not be responsive to the NFL's needs. For example, Minnesota gives first-time violators the right to

¹²The NFL currently has franchises in twenty-two states, so theoretically a new NFL standard geared to satisfy the most protective state law would not need to satisfy the law of any U.S. state.

¹³The state of Louisiana has a statute that regulates workplace drug testing that is similar to Minnesota's. The Louisiana statute, however, provides an exemption for the NFL. As a result, two players from the New Orleans Saints who, like the Williams, ingested StarCaps and thus tested positive for the banned diuretic bumetanide, are eligible to serve their four-game suspension imposed by the NFL pursuant to league policy.

go to rehabilitation; the NFL's policy suspends first-time offenders immediately. The NFL may prefer its more punitive response because of the comparative brevity of the typical NFL career when compared to that of the typical wage earner subject to state law. Prolonged, long-term sanctions with multiple chances for cure may not be effective for players who are practically speaking close to retirement.

Option 2: The NFL has appealed the panel decision to the en banc Court of Appeals, and should it lose there, could appeal to the Supreme Court. The pre-emptive scope of labor law is judge-made, and therefore it is always possible that a high court could expand the scope of Section 301 preemption.

Option 3: The U.S. Congress could amend Section 301 to preempt any state claim that would conflict with any drug-testing policy incorporated as part of a valid collective bargaining agreement.

Option 4: In the next collective agreement, the NFL and the NFLPA could amend the current drug policy to require mandatory arbitration of all state claims related to drug testing.¹⁴

¹⁴The courts have long favored arbitration agreements in collective bargaining agreements involving professional sports. *Davis v. Pro Basketball, Inc.*, 381 F.Supp. 1 (S.D.N.Y. 1974); *Erving v. Virginia Squires Basketball Club*, 349 F.Supp. 716 (E.D.N.Y. 1972); *Kansas City Royals v. Major League Baseball Players Association*, 532 F.2d 615 (8th Cir. 1976).

Just this year, in the 14 Penn Plaza decision,¹⁵ the Supreme Court explicitly sanctioned a union's waiver of a statutory right to a judicial forum in age discrimination claims. By the same logic, the player's association should be allowed legally to waive rights created by state drug testing laws. Here the Players Association would waive the right to the judicial forum, and not the substantive right itself. The waiver must be clear and unmistakable. Thus, all drug testing-related claims would be subject to arbitration. If a player believes he has a claim under the state law, the union would have the discretion to file a grievance on his behalf.¹⁶

¹⁵14 Penn Plaza v. Pyett, Slip Opinion (07-581) April 1, 2009.

¹⁶Unions of course are not obliged to process all grievances claimed by members of a bargaining unit. Unions frequently choose not to do so. In the NFL, the NFLPA alone controls access to arbitration. *Chuy v. NFLPA*, 495 F.Supp. 137 (E.D.Pa. 1980). The union's only constraint is the duty of fair representation, which sets a very deferential standard in judging the union's grievance processing decisions. So if a player's conduct constitutes a violation of: (a) the CBA's substance abuse policy and (b) a parallel (but more protective) state law, the union can choose to grieve: (a), (b), (a/b), or none. In the wake of Penn Plaza, this seems like a possible strategy for unions and employers. However, it's unclear whether a court would uphold a union's decision to both waive a statutory right to a judicial forum and refuse to process a grievance related to that right. Unions are under a duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967).

APPENDIX

State Statutes that Govern Workplace Drug Testing

Alabama

Alabama subscribes to the “Drug Free Workplace Act,” which provides benefits to employers who use certain drug testing procedures for their employees. Ala. Code § 25-5-330 (1995). The purpose of the act is to promote a workplace free of drugs. *Id.* The program is required to contain:

- (1) A written policy statement as provided in Section 25-5-334.
- (2) Substance abuse testing as provided in Section 25-5-335.
- (3) Resources of employee assistance providers maintained in accordance with Section 25-5-336.
- (4) Employee education as provided in Section 25-5-337(a).
- (5) Supervisor training in accordance with Section 25-5-337(b). Ala. Code § 25-5-333 (1995).

The program also requires written notice by the employers to the employees explaining the types of testing available and the bases for testing, the actions an employer may take against an employee after a positive test, a statement of confidentiality, the consequences of refusing to submit to a test, and an explanation that an employee who receives a positive test may contest the result within five working days of notification of the result. Ala. Code § 25-5-334 (1995). The statute also lists when an employer can give a drug test to an employee, including reasonable suspicion testing. Ala. Code § 25-5-335 (1995).

Alaska

Alaska’s drug testing policy states that employers must disclose a drug testing policy to their employees and cannot test outside the bounds of that policy. Alaska Stat. § 23.10.600 (2007). Drug testing by employers is not mandatory, and by following the rules regarding drug testing, employers are immune from lawsuits by employees for being drug tested. Alaska Stat. § 23.10.610-15 (2007). These laws are collectively termed the “Drug Free Workplace Act.” *Id.*

Arizona

Employers in Arizona may drug test their employees subject to the written policy the employer has previously distributed to all employees subject to the testing or that was made readily available to them in the same manner as the personnel handbook. Ariz. Rev. Stat. Ann. § 23-493.04(A) (2000). The employer is responsible for creating the policy. Under the policy, employers may test their employees, so long as it is for “any job-related purposes consistent with business necessity.” *Id.* Specifically listed as when an employer can drug test an employee are:

1. Investigation of possible individual employee impairment.
2. Investigation of accidents in the workplace. Employees may be required to undergo drug testing or alcohol impairment testing for accidents if the test is taken as soon as practicable after an accident and the test is administered to employees who the employer reasonably believes may have contributed to the accident.
3. Maintenance of safety for employees, customers, clients or the public at large.
4. Maintenance of productivity, quality of products or services or security of property or information.
5. Reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment. Ariz. Rev. Stat. Ann. § 23-493.04(B) (2000).

Further, an employer may randomly drug test its employees subject to the written policy. Ariz. Rev. Stat. Ann. § 23-493.04(C) (2000). An employer may then use a positive test or a refusal to submit to a test as a basis for action, including mandatory entrance in treatment, suspension, termination or “other adverse employment action.” Ariz. Rev. Stat. Ann. § 23-493.05 (2000).

Arkansas

The laws in Arkansas were designed to promote a drug free workplace for employers. Employers are required to inform their employees in writing before testing. Ark. Code § 11-14-105 (2001). The statutes do not explain what methods should be used or what an employer can do in the event of a positive test result.

Connecticut

Connecticut has a much stricter drug testing policy. The statute states

No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive

urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result and (2) such positive test result was confirmed by a second urinalysis drug test, which was separate and independent from the initial test, utilizing a gas chromatography and mass spectrometry methodology or a methodology which has been determined by the Commissioner of Public Health to be as reliable or more reliable than the gas chromatography and mass spectrometry methodology. Conn. Gen. Stat. § 557-31-51(u) (2003).

Employers are also not allowed to view an employee as he/she is producing the specimen for the urinalysis. Conn. Gen. Stat. § 557-31-51(w) (2003).

“No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.” Conn. Gen. Stat. § 557-31-51(x) (2003).

Georgia

Georgia also subscribes to the “Drug Free Workplace Act.” Ga. Code Ann. § 34-9-410 (2003). The statutes, however, do not describe the requirements of the act. The only specific requirements listed are those for public employment.

Hawaii

The statutes in Hawaii list many requirements for the laboratories that receive the results. Hawaii Rev. Stat. Ann. §§ 329B 4-5 (2007). Employers there are allowed to administer a “substance abuse on-site screening test.” *Id.* Before any testing, the employee must receive written notice of what the test is designed to find and that prescription or over the counter medications may be found in the test. *Id.* If there is a positive result with an employee in the screening test, the employer must send the employee, within four hours, to a licensed employee for a drug test. *Id.* Before testing, an employee must be informed that he/she has the right to refuse the test, but that the employer may commence an adverse employment action against the employee as a result of refusal. *Id.*

Idaho

Idaho subscribes to the “Drug Free Workplace Act.” Idaho Code § 72-1702(1) (2002). The statute also includes a list of how the test should be taken, including the procedures set forth for the person administering the test. Idaho Code § 72-1704 (2002).

Employers are required to give their employees their drug testing policy in writing prior to any drug testing. Idaho Code § 72-1705 (2002). The policy must explain that an employee may be terminated for violation of this policy. *Id.* The employer must also include in the policy the situations in which it can drug test the employees, including “random” and “reasonable suspicion.” *Id.*

In the event of a positive test result, the employee must receive written notice of the positive result and must be given an opportunity to explain the test result. Idaho Code § 72-1706 (2002). The employee can also request a retest within seven working days of the positive test result. *Id.* An employer can demonstrate the termination of an employee for “work related conduct” if the employee fails a drug test, refuses to submit to a drug test, alters a drug test, or gives a sample that is not his/her own. Idaho Code § 72-1707 (2002).

Illinois

Illinois also subscribes to the “Drug Free Workplace Act” for public employees and for the employees of employers contracting with the government. 30 ILCS 580. Here, the Act does not mention private employers and their employees.

Iowa

Iowa has a statute entitled “Private Sector Drug-Free Workplaces.” Iowa Code 730.5 (2006). The statute here does have a disclaimer: “This section does not apply to drug or alcohol tests conducted on employees required to be tested pursuant to federal statutes, federal regulations, or orders issued pursuant to federal law.” Iowa Code § 730.5(2) (2006). An employer is not required to drug test its employees and may even limit testing to employees at certain job sites. Iowa Code § 730.5(3) (2006). An employer may make the submission of an employee to a drug test a condition of employment and continued employment. Iowa Code § 730.5(4) (2006). Employers may require of their employees reliable pieces of identification before testing. Iowa Code § 730.5(5) (2006). The test itself should occur either during, or immediately before or following the employee’s workday. Iowa Code § 730.5(6)(a) (2006). The statute describes in significant detail the procedures that must be followed during an employee drug test. Iowa Code § 730.5(7) (2006). An employer may take an adverse employment action against an employee who has a positive drug test. Iowa Code § 730.5(7)(f) (2006).

Employers may conduct random drug testing of all employees selected from three types of pools of employees: “the entire employee population at a particular work site,” “the entire full-time active employee population at a particular work site,” and “[a]ll employees at a particular

work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted.” Iowa Code § 730.5(8)(a) (2006). Employers may also conduct drug tests of prospective employees, employees immediately after leaving treatment or rehabilitation, for reasonable suspicion, in investigating accidents in the workplace, and as required by federal law. Iowa Code § 730.5(8) (2006).

Like other states under the “Drug Free Workplace Act,” employers are required to provide employees with a written policy on drug testing in advance of any actual testing. Iowa Code § 730.5(9) (2006). After a positive test, an employer can take action against the offending employee, including refusal to hire a prospective employee, suspension of the employee with or without pay, termination of employment, required enrollment in treatment, or any other adverse employment action explained in the employer’s policy. Iowa Code § 730.5(10)(a) (2006).

Maine

Maine requires of an employer to have an Employee Assistance Program before it can drug test its employees. Maine Rev. Stat. Ann. § 26-683(1) (1995). Like many other states, an employer must provide a written policy to its employees prior to any testing. Maine Rev. Stat. Ann. § 26-683(2) (1995). The policy must include the procedure, state when drug testing may occur, and explain how the samples are collected. Employees may not be required to remove clothing, nor be observed directly giving a urine sample. The policy must also stipulate the consequences of a positive test, the consequences of refusing to submit to a test, opportunities for rehabilitation after a positive test, and methods for the employee to appeal a positive test free of charge. *Id.* The employer must provide the written policy to its employees no fewer than 30 days before the policy comes into effect. Maine Rev. Stat. Ann. § 26-683(3) (1995).

An employer may test an employee if a supervisor has “probable cause” to test, which must be provided in writing. Maine Rev. Stat. Ann. § 26-684(2) (1995). An employer may do random drug testing if it was agreed to in the collective bargaining agreement, the nature of the employee’s job would create a hazard to others, the employer has a written policy created with the help of an employee committee. Maine Rev. Stat. Ann. § 26-684(3) (1995).

While waiting for test results, an employer may suspend the employee without pay. Maine Rev. Stat. Ann. § 26-685(1) (1995). An employer may use a positive test result to discharge, discipline, refuse to hire, or reassign an employee. Maine Rev. Stat. Ann. § 26-685(2) (1995). After a positive result, an employer must provide the employee with up to six months of rehabilitation. *Id.*

All employers must submit their policies to the Department of Labor to be reviewed before implementation. Maine Rev. Stat. Ann. § 26-686 (1995).

Minnesota

Minnesota requires employers to have a written testing policy before they are allowed to drug test their employees. Minn. Stat. Ann. § 181.951(1)(b) (2005). The policy must include which employees may be tested, the circumstances under which a test can be requested, the right of an employee to refuse a test and the consequences for the refusal, any discipline that could result from a positive test, the right an employee has to explain a positive test or request a retest, and any other appeals available to the employees. Minn. Stat. Ann. § 181.952 (1987). Employers may randomly test their employees so long as the employee is either in a safety sensitive position or is a professional athlete and the athlete's collective bargaining agreement allows for such testing. Minn. Stat. Ann. § 181.951(1)(c) (2005). Employers may also test if they have reasonable suspicion that the employee is under the influence of drugs, has violated the employer's work rules regarding the use of drugs, has sustained a physical injury or has caused such in another employee, or caused a work related accident. *Id.*

Before any testing, the employer must provide to the employee a form to sign acknowledging that he/she has seen the employer's drug testing policy. Minn. Stat. Ann. § 181.953(6) (2005). After a positive test, an employee must be given notice of his/her right to explain the test result. *Id.* An employer cannot discipline an employee after a positive test unless the initial screening was verified by a confirmatory test and the employer has offered some type of rehabilitation or treatment. Minn. Stat. Ann. § 181.953 (2005).

Mississippi

Mississippi requires an employer to provide a written policy to its employees no fewer than 30 days before it can drug test any employees. Miss. Code § 71-7-3 (2004). The written policy must contain the same information as those in Minnesota and many other states listed above. *Id.* Like many other states, the policy should also be posted and made available to view in the workplace. *Id.* An employee may be requested to sign a form saying he/she has viewed the drug testing policy prior to any testing. *Id.*

Employers must elect to fall under the laws by posting and providing its employees with a written policy which explains the law. Miss. Code § 71-7-27 (2004). Employers do not have to follow these laws, but if they do not do so, they are not afforded the protection from liability from civil action from their tested employees. *Id.*

Employers may require drug testing as part of the application process, for reasonable suspicion, and "neutral selection." Miss. Code § 71-7-5 (2004). The statutes contain detailed explanations of the manner in which the testing can occur, including allowing the employee to explain any medications he/she may be taking, that the employer must notify the employee of a positive test within five working days of receiving the result, and the employee has ten working days after receiving a positive result to explain the results. *Id.*

An employer may not discharge an employee until after receiving confirmatory results, Miss. Code § 71-7-9 (2004), though the employer may temporarily suspend or transfer the

employee to another position after an initial positive test. Miss. Code § 71-7-13 (2004). A positive result may lead to a discharge for cause. Miss. Code § 71-7-9 (2004).

Montana

Like many other states, Montana requires the posting and distribution of a written policy to employees, but here it must be done sixty days before any testing. Mont. Code Ann. § 39-2-207 (2009). Further, the policy must include any criminal sanctions that a positive drug test may bring. *Id.* Before an employer may take action after a positive test, the results must be reviewed by a certified representative and the employee must be allowed to explain any positive result. *Id.* An employer may randomly test its employees if its testing policy includes an established date when all employees will be tested or an agreement with a third party to administer the random drug tests. Mont. Code Ann. § 39-2-208 (2009). An employer may also test an employee if it has “reason to suspect” that the use of drugs is inhibiting the ability of the employee to do his/her job or contributed to a work related accident. *Id.*

An employee must be presented with the report of any positive test and has the right to request an additional test. *Id.*

Nebraska

Nebraska requires a confirmatory test before an adverse employment action may commence. Neb. Rev. Stat. § 48-1903 (2000). Employers must detail the chain of custody of all specimens obtained. Neb. Rev. Stat. § 48-1905 (1988). An employee who refuses to submit to a drug test may be disciplined, including possible discharge. Neb. Rev. Stat. § 48-19010 (1988). Nebraska does not seem to require the posting or distribution of a drug testing policy prior to any employee testing.

North Carolina

The taking of samples in North Carolina should be done so in a manner to “preserve dignity,” but also to prevent the substitution of samples by the person being tested. N.C. Gen. Stat. § 95-232 (2006). The person being examined has the right to order a retest of a confirmed positive sample. *Id.* The statute provides “that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances.” *Id.*

Oklahoma

Oklahoma has the “Standards for Workplace Drug and Alcohol Testing Act.” Okla. Stat. Ann. § 40-551 (1993). “Drug or alcohol testing required by and conducted pursuant to federal law or regulation shall be exempt from the provisions of the Standards for Workplace Drug and Alcohol Testing Act and the rules promulgated pursuant thereto.” Okla. Stat. Ann. § 40-553 (1993). Employers who elect under the statute to test employees may only do so in the following situations: applicant testing, reasonable suspicion, post-accident, random testing, scheduled periodic testing, and post-rehabilitation. Okla. Stat. Ann. § 40-554 (1993).

Before any testing, the employer must have adopted a written policy that is uniformly applied to the workforce, which will include: the employer’s policy toward drug use, who may be tested, circumstances that may give rise to testing, what substances will be tested for, methods and procedures of testing, consequences of refusal to be tested, consequences of a positive test, the right of an employee to explain a positive test, the available appeals process, and the right to receive the testing reports. Okla. Stat. Ann. § 40-555 (1993). Employees must have at least 30 days notice before the implementation or change of the testing policy. *Id.* The policy should be distributed to each employee and posted in the workplace. *Id.* “Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.” *Id.*

Those obtaining the sample must be certified by the state health board. Okla. Stat. Ann. § 40-559 (1993). Employees tested should be given privacy during the test, which means they cannot be watched during a urinalysis. *Id.*

An employee may not be terminated before confirmation of a positive test, but may be temporarily suspended at that time. Okla. Stat. Ann. § 40-562 (1993).

Rhode Island

Rhode Island has a list of requirements that an employer must follow to require an employee to submit to a drug test as a condition of continued employment. R.I. Gen. Laws § 28-6.5-1 (2003). These requirements include reasonable suspicion the employee in his/her ability to perform work is impaired due to drug or alcohol use, and that the test be done in private.

Employees testing positive must be referred to a treatment specialist but not terminated from employment. The employee also has a reasonable opportunity to explain the results and may have the sample tested at an independent facility. *Id.*

South Carolina

South Carolina subscribes to the Drug Free Workplace Act for any employer wishing to contract with the state. S. Car. Code of Laws § 44-107 (1991). The rules are mirror those of Alabama and Idaho listed above.

Tennessee

Tennessee subscribes to the Drug Free Workplace Act for any employer wishing to contract with the state. Tenn. Code § 50-9-105 (2001). The rules are mirror those of Alabama and Idaho listed above.

Utah

“Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.” Utah Code § 34-38-5 (2001). An employer must have a written policy on drug testing distributed to employees and available for viewing before testing any employee. Utah Code § 34-38-7 (2001). An employer may test an employee for investigation of impairment, investigation of workplace accidents or theft, maintenance of safety, maintenance of productivity or quality of product. *Id.* After a positive test result, an employer may suspend, terminate, enroll in rehabilitation, “or other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.” *Id.*

Vermont

An employer may not drug test its employees unless the employer has probable cause to test and the employer has an employee assistance program. 21 V.S.A. § 513 (1987). Further, an employer cannot terminate an employee after a positive test result if the employee has completed the employee assistance program. *Id.* However, the employer may suspend the employee during the time the employee is in the employee assistance program. *Id.* In order to test, certain other requirements must also be met, including: the test should be designed to only test for the presence of alcohol or drugs; the employer has previously distributed to all employees a written policy detailing what will happen in the event of a positive test; the procedures have been described in detail, including the timing of the test. 21 V.S.A. § 514 (1987).