But See *Guiney*: Revisiting Mandatory Random Suspicionless Drug Testing of Massachusetts Public-Sector Safety-Sensitive Employees in Light of House Bill 2210

"[T]he unlawful obtaining, possession, and use of drugs cannot be reconciled with respect for the law. Surely, the public interest requires that those charged with responsibility to enforce the law respect it."[1]

I. INTRODUCTION

On August 29, 2007, a grease fire in West Roxbury killed two members of the Boston Fire Department.[2] According to media reports of the autopsy results, the firefighters were under the influence of alcohol and drugs at the time of their deaths, and presumably, when they responded to the fire that claimed their lives.[3] In the wake of this tragic accident, public and political support for mandatory, random drug testing of safety-sensitive personnel has grown in Massachusetts.[4] House Bill 2210—An Act Relative to Public Safety Employees (House Bill 2210)—addresses that increased concern, authorizing random drug and alcohol testing of all publicly and privately employed public-safety personnel within the Commonwealth.[5] The current debate over random

1. O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1149-50 (Mass. 1990).

2. *See* Martin Finucane, *Federal Report Criticizes Boston Fire Department in Fatal 2007 Fire*, BOS. GLOBE, Nov. 11, 2009, *available at* http://www.boston.com/news/local/breaking_news/2009/11/federal_report_1.html (discussing National Institute for Occupational Safety and Health's critical report of Boston Fire Department).

3. *See id.* (noting traces of drugs and alcohol found in autopsy results). Autopsy reports showed that one deceased firefighter had a blood alcohol level of .27, and the other had traces of cocaine in his system. *Id.*; *see also* Ralph Blumenthal & Katie Zezima, *Firefighters' Deaths Add to Pressure for Drug Tests*, N.Y. TIMES, Oct. 6, 2007, *available at* http://www.nytimes.com/2007/10/06/us/06boston.html (noting accounts of autopsies showed high alcohol level and traces of cocaine in firefighters' blood).

4. *See* Blumenthal & Zezima, *supra* note 3 (discussing various city drug testing policies in light of impaired West Roxbury firefighters' deaths); *see also* JAMES M. SHANNON ET AL., BOSTON FIRE DEPARTMENT INDEPENDENT REVIEW PANEL, REPORT TO MAYOR THOMAS M. MENINO 10-11 (2007), *available at* http://www.cityofboston.gov/Images_Documents/Independent_Review_Panel_tcm3-4028.pdf (recommending Boston Fire Department personnel in safety-sensitive positions undergo random drug testing throughout careers); Samuel R. Tyler, Op-Ed, *Follow-Through at the Fire Dept.*, BOS. GLOBE, Oct. 19, 2007, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/10/19/follow_through_at_the_fire_dept (noting need for drug testing raised in 2000 report commissioned by Mayor Menino).

5. *See* H.R. 2210, 186th Gen. Court, Reg. Session (Mass. 2009) (indicating employment contexts in which proposed drug testing authorized). The current bill authorizes random drug and alcohol testing of "all public safety employees of the commonwealth or any municipality," as well as emergency medical technicians, "[n]otwithstanding the provisions of any general or special law, rule or regulation to the contrary." *Id.* Such testing regime is required to meet "standards promulgated by the secretary of the executive office of public

drug testing of fire department personnel echoes a debate that took place almost twenty years ago over drug testing of Boston police officers—a practice the Supreme Judicial Court denounced in its deeply divided *Guiney v. Police Commissioner of Boston* opinion.[6]

Guiney followed several United States Supreme Court cases upholding random urinalysis testing of employees in highly regulated industries.[7] In fact, since the Supreme Court's decisions in *National Treasury Employees Union v. Von Raab*[8] and *Skinner v. Railway Labor Executives' Ass'n*,[9] state and federal appellate courts have generally upheld random suspicionless drug testing of public and private employees engaged in public safety, safety-sensitive, or other similarly conceptualized tasks, including police officers, firefighters and emergency medical technicians.[10] Mandatory, random, suspicionless drug

safety and security." *Id.*

6. *See* 582 N.E.2d 523, 526-27 (Mass. 1991) (holding Boston Police Department Rule 111 authorizing random urinalysis of police officers unconstitutional). Under article XIV of the Massachusetts Constitution, "unannounced, warrantless, suspicionless, random urinalysis testing" constitutes an unreasonable search and seizure. *Id.* at 525; *see* MASS. CONST. pt. I, art. XIV (prohibiting unreasonable searches and seizures). Article XIV states, in pertinent part, "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." MASS. CONST. pt. I, art. XIV. A year prior to its decision in *Guiney*, the Massachusetts Supreme Judicial Court held that random urinalysis testing was not an unreasonable search and seizure of a police cadet within the meaning of article XIV where the cadet had consented to testing in a pre-employment agreement. *See O'Connor*, 557 N.E.2d at 1149-50. Additionally, a prior case from the First Circuit Court of Appeals, on appeal from the District of Massachusetts, similarly upheld Boston Police Department Rule 111 under the Fourth Amendment. *See* Guiney v. Roach, 873 F.2d 1557, 1558 (1st Cir. 1989) (holding random urinalysis of police officers carrying firearms and participating in drug interdiction constitutional).

7. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 679 (1989) (holding random drug testing of Customs Service employees meets reasonableness requirement of Fourth Amendment). In pronouncing reasonable the testing of Customs Service employees directly involved in the interdiction of illegal drugs, the Court stated, "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." *Id.* at 672; *see also* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 634 (1989) (holding federal regulations requiring railway employees to produce urine samples reasonable within Fourth Amendment's meaning). In both *Von Raab* and *Skinner*, the Court held that "government interests in drug interdiction and safety outweighed the 'diminished expectations of privacy' of those who apply for or hold these positions." Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 774 (2006) (chronicling "War on Drugs" and "War on Terror," suggesting civil liberties more damaged by former). Ashdown posits that the Court has steadily expanded the permissive scope of suspicionless drug testing, such that it now permits "governmental intrusion into privacy without any individualized justification whatsoever." *Id.* at 775.

8. 489 U.S. 656 (1989) (5-4 decision).

9. 489 U.S. 602 (1989).

10. *See generally, e.g.*, Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606 (4th Cir. 1996) (meter repairman for public utility); Saavedra v. City of Albuquerque, 73 F.3d 1525 (10th Cir. 1996) (firefighter and emergency medical technician); Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287 (3d Cir. 1996) (seamen operating oil tankers); Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (pipeline operators); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (airline personnel); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (county correctional employees with access to prisoners and weapons); Nat'l Fed'n of Fed. Emps. v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) (civilian Army employees); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (chemical weapons plant workers); Harmon v.

testing, while no doubt the most controversial of any type of drug testing, has often been upheld under limited conditions, for example, when the public safety is involved.[11]

This Note will examine the short and contentious history of drug testing in the United States.[12] It will review Supreme Court precedent for upholding suspicionless drug testing of public-safety personnel, as well as state statutes and case law authorizing workplace drug testing, with a particular focus on the testing of public-sector safety-sensitive personnel.[13] This Note will examine the tension between *O'Connor v. Police Commissioner of Boston*[14] and *Guiney v. Police Commissioner of Boston*,[15] two arguably conflicting Massachusetts public-sector drug testing decisions.[16] Lastly, it will review more recent private-sector decisions to determine the current state of Massachusetts law regarding drug testing of public and private employees in safety-sensitive positions.[17] This Note will conclude by suggesting amendments to House Bill 2210, or guidelines for the Secretary of the Executive Office of Public Safety and Security, to conform to the holding in *Guiney*.[18]

II. HISTORY

A. The 1980s: Declaring a War on Drugs (in the Workplace)

Workplace drug testing became a national phenomenon in the 1980s.[19] Drug testing had its nascence in the military, several years prior to President

Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice employees with top secret clearances); Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989) (school system employees involved in transportation of handicapped children); *Guiney*, 873 F.2d 1557 (police officers carrying firearms and engaged in drug interdiction); Policemen's Benevolent Ass'n of N.J., Local 318 v. Twp. of Washington, 850 F.2d 133 (3d Cir. 1988) (police officers); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (state corrections department employees); Smith v. Fresno Irrigation Dist., 84 Cal. Rptr. 2d 775 (Cal. Ct. App. 1999) (construction and maintenance workers); McCloskey v. Honolulu Police Dep't, 799 P.2d 953 (Haw. 1990) (police officers); Doe v. City of Honolulu, 816 P.2d 306 (Haw. Ct. App. 1991) (firefighters); N.J. Transit PBA Local 304 v. N.J. Transit Corp., 701 A.2d 1243 (N.J. 1997) (transit police officers); Caruso v. Ward, 530 N.E.2d 850 (N.Y. 1988) (police officers in narcotics unit).

11. *See supra* note 10 (collecting cases); *infra* note 87 (collecting cases).

12. *See infra* Part II.A (presenting historical development of drug-testing, noting objections to testing).

13. *See infra* Parts II.B and II.C (discussing *Von Raab*, *Skinner*, state statutes, and case law).

14. 557 N.E.2d 1146 (Mass. 1990).

15. 582 N.E.2d 523 (Mass. 1991).

16. *See infra* Part II.D.1 (analyzing *O'Connor* and *Guiney*).

17. *See infra* Part II.D.2 (analyzing article XIV case law).

18. *See infra* Part III (proposing amendments to House Bill 2210).

19. *See* Yale H. Caplan & Marilyn A. Huestis, *Introduction: Drugs in the Workplace*, *in* WORKPLACE DRUG TESTING 1-2 (Steven B. Karch ed., 2008) (outlining history of workplace drug testing); J. Michael Walsh, *Development and Scope of Regulated Testing*, *in* DRUG ABUSE HANDBOOK 741-47 (Steven B. Karch ed., 1st ed. 1998) (discussing growth of workplace drug testing from 1982 to 1997). Drug testing was first introduced in the United States military with great variation among the procedures, equipment, and standards used. *See* Walsh, *supra*, at 741-42.

Reagan's well-known declaration of a War on Drugs.[20] President Nixon directed the Secretary of Defense to initiate a drug prevention program in 1971, after increasing numbers of service members in Vietnam were found to be using heroin and other drugs.[21]

The advent of regulated testing in the workplace can be traced to around 1983, when the National Transportation Safety Board issued a series of recommendations, advocating the development and implementation of a meaningful alcohol and drug testing regime for railroad employees.[22] In 1983, President Ronald Reagan established the President's Commission on Organized Crime (Commission).[23] The Commission issued its final report in March of

20. *See* Caplan & Huestis, *supra* note 19, at 2 (noting testing highly regimented but varied within military programs); Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 HARV. J.L. & TECH. 65, 70 (1991) (tracing widespread drug testing in military beginning in 1981).

21. *See* President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (Jun. 17, 1971), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=3047 (discussing appointment of Dr. Jerome Jaffe as Special Consultant to President for Narcotics and Dangerous Drugs). In that speech, President Nixon pronounced, "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive." *Id.*; *see also* Gerry J. Gilmore, *DoD Winning 30-Year War Against Drugs in the Ranks*, AM. FORCES PRESS SERVICE, Oct. 19, 2000, *available at* http://www.defense.gov/news/newsarticle.aspx?id=45495 (noting Department of Defense tested to identify and treat heroin addicts who developed habits in Vietnam).

22. *See, e.g.*, Letter from Jim Burnett, Chairman, Nat'l Transp. Safety Bd., to John T. Collinson, President, Balt. & Ohio R.R. Co. (Apr. 29, 1983), *available at* http://www.ntsb.gov/Recs/letters/1983/R83_35_36.pdf (recommending implementing "aggressive supervisory program"); Letter from Jim Burnett, Chairman, Nat'l Transp. Safety Bd., to Fred A. Hardin, President, United Transp. Union (Apr. 29, 1983), *available at* http://www.ntsb.gov/Recs/letters/1983/R83_38_39.pdf [hereinafter Apr. 29, 1983 Letter from Jim Burnett to Fred A. Hardin] (recommending United Transportation Union implement alcohol rules); Letter from Jim Burnett, Chairman, Nat'l Transp. Safety Bd., to Hon. Robert W. Blanchette, Adm'r, Fed. R.R. Admin. (Mar. 7, 1983), *available at* http://www.ntsb.gov/Recs/letters/1983/R83_30_32.pdf [hereinafter Mar. 7, 1983 Letter from Jim Burnett to Robert W. Blanchette] (positing railroad safety would be positively impacted by testing); Letter from Jim Burnett, Chairman, Nat'l Transp. Safety Bd., to W.H. Dempsey, President, Am. Ass'n of Railroads (Mar. 7, 1983), *available at* http://www.ntsb.gov/Recs/letters/1983/R83_28_29.pdf (detailing intoxication of crewmembers involved in two recent railway accidents); Letter from Jim Burnett, Chairman, Nat'l Transp. Safety Bd., to Fred A. Hardin, Exec. Sec'y, Ry. Labor Execs. Ass'n (Mar. 7, 1983), *available at* http://www.ntsb.gov/Recs/letters/1983/R83_33_34.pdf (noting NTSB has "long been concerned about the role of alcohol and drugs in railroad accidents"). In his April 29, 1983 letter to the United Transportation Union, Burnett opined that the Union should "[a]ctively support the development and implementation of more meaningful alcohol abuse rules and procedures to curb use of alcohol by railroad operating employees during a specific period before they report for duty and while they are on duty." Apr. 29, 1983 Letter from Jim Burnett to Fred A. Hardin, *supra*. In his March 7, 1983 letter to the Federal Railroad Administration, Burnett stated that safety "would be greatly improved if employees knew that toxicological tests would be taken of the surviving employees as well as of those fatally injured in the event of a railroad accident that is required to be reported to the [Federal Railroad Administration] or the Safety Board." Mar. 7, 1983 Letter from Jim Burnett to Robert W. Blanchette, *supra*. *See generally* Walsh, *supra* note 19, at 730 (noting NTSB report to Secretary of Transportation indicating seven train accidents between June 1982 and May 1983). In response to the NTSB recommendations, the Federal Railroad Administration and the National Institute on Drug Abuse developed the first Department of Transportation drug regulations in 1983. *See id.*

23. *See* Exec. Order No. 12,435, 48 Fed. Reg. 34,723 (July 28, 1983), *amended by* Exec. Order No. 12,507, 50 Fed. Reg. 11,835 (Mar. 22, 1985), *revoked by* Exec. Order No. 12,610, 52 Fed. Reg. 36,901 (Sept. 30, 1987), *reprinted as amended in* 18 U.S.C. § 1961 (1988) (establishing Commission and requiring it to issue final report by March 1, 1986). The Commission was tasked with, among other things, making

1986, recommending that:

> The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, [i]ncluding suitable drug testing. . . . Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program.[24]

In response to the Commission's report, President Reagan issued Executive Order 12,564[25] (Order), which set forth the policy mandate for the later-enacted Drug-Free Workplace Act of 1988 (1988 Act).[26] Significantly, the Order required the head of each federal executive agency to establish a program to test for illegal drug use by employees in "sensitive positions."[27] Congress required that several administrative prerequisites be fulfilled before making federal funding available to administer or implement drug testing pursuant to the Order, including issuing comprehensive standards and procedures to carry out the Order.[28] The Department of Health and Human Services guidelines

"recommendations concerning appropriate administrative and legislative improvements and improvements in the administration of justice." *Id.*

24. PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, & ORGANIZED CRIME (1986), *available at* http://www.druglibrary.org/schaffer/govpubs/amhab/amhabc8.htm; *see also* Caplan & Huestis, *supra* note 19, at 2-3 (quoting Commission on Organized Crime report).

25. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986), *reprinted in* 5 U.S.C. § 7301 (2006) (setting forth programs and procedures for drug-free workplace). President Reagan noted that illegal drug use by certain federal employees "evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law." *Id.*

26. *See id.* (noting special position of federal employees). President Reagan stated that "[t]he use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public." *Id.*; *see also* 41 U.S.C. §§ 701-07 (2006) (Drug-Free Workplace Act of 1988) (setting forth drug-free workplace requirements for federal contractors and grant recipients).

27. *See* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986), *reprinted in* 5 U.S.C. § 7301 (2006) (suggesting such positions defined by access to sensitive information among other factors). Drug use by employees in sensitive positions, the Order indicates, may pose risk "to national security, the public safety, and the effective enforcement of the law." *Id.*; *see also* Rothstein, *supra* note 20, at 70 n.33 (reciting definition of employee in "sensitive position"). As Rothstein points out, the Order defines employees in sensitive positions as those "granted access to classified information, individuals serving under Presidential appointments, law enforcement officers, and others in positions involving 'national security, the protection of life' and property, public health or safety, or other functions requiring a high degree of trust and 'confidence.'" Rothstein, *supra* note 20, at 70 n.33.

28. *See* 41 U.S.C. §§ 701-07 (2006) (setting forth requirements for federal funding); Caplan & Huestis,

established, among other things, specimen collection procedures and controls, laboratory analysis procedures, and chain of custody and recordkeeping requirements.[29]

More drug-testing legislation soon followed.[30] In 1991, Congress passed the Omnibus Transportation Employee Testing Act of 1991,[31] authorizing pre-employment, reasonable suspicion, random, and post-accident testing of transportation employees "responsible for public safety functions."[32]

Employee drug testing thus began within the federal government and companies performing government contracts, and subsequently spread to the private sector.[33] Corporate entities, especially in the oil, chemical, transportation, and nuclear industries, voluntarily began conducting employee drug tests.[34] By 1988, 28% of the country's largest corporations, including AT&T and General Motors, were using drug tests to screen job applicants.[35] The National Institute of Drug Abuse estimates that by 1990, the number had risen to 40%.[36] In this way, drug testing spread to the private sector.[37]

supra note 19, at 3 (noting Secretary of Health and Human Services required to publish technical and scientific guidelines for testing).

29. *See* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970-01, 11,982 to 11,986 (Apr. 11, 1988) (promulgating scientific employee drug testing guidelines for compliance by federal agencies); Caplan & Huestis, *supra* note 19, at 3 (noting official guidelines published in Federal Register after comment and revision on April 11, 1988); *see also* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986), *reprinted in* 5 U.S.C. § 7301 (2006) (directing Department of Health and Human Services to promulgate universal scientific, technical drug testing guidelines).

30. *See infra* notes 31-32 and accompanying text (discussing Omnibus Transportation Employee Testing Act of 1991); *see also infra* Part II.C (setting forth state legislation).

31. 49 U.S.C. §§ 5301-40 (2006). Section 5301(a) explains that the statute was enacted with the purpose of revitalizing the public transportation systems. *Id.* § 5301(a).

32. *Id.* § 5331(b)(1)(A) (authorizing testing for alcohol and controlled substances of employees in safety-sensitive transportation positions).

33. *See* Barbara Presley Noble, *At Work; Testing Employees for Drugs*, N.Y. TIMES, Apr. 12, 1992, *available at* http://www.nytimes.com/1992/04/12/business/at-work-testing-employees-for-drugs.html (chronicling 1986 Reagan administration "drug-free" federal workplace policy and Drug-Free Workplace Act of 1988). Noble notes that the Drug-Free Federal Workplace Act of 1988, which required companies with federal contracts to establish drug policies and make "good faith" efforts to maintain a drug-free workplace, had a tremendous impact on employers. *See id.* Noble highlights a report released in April of 1992 by the American Management Association (AMA), which then represented 7000 medium- to large-sized firms constituting 25% of the American work force. *See id.* According to that report, 75% of the 1200 companies responding to an AMA questionnaire tested for controlled and illegal substances in 1992—a 250% increase over the reported testing in 1987, the first year the AMA surveyed workplace testing policies. *See id.*

34. *See* Walsh, *supra* note 19, at 741-42 (noting between 1983 and 1986 certain industries voluntarily implemented drug-testing programs).

35. *See* Michael Isikoff, *Corporate Drug Testing on the Rise, Survey Says; 28% of Largest Companies Screen Applicants*, WASH. POST, Jun. 10, 1988, at A18 (discussing rise in corporate drug testing).

36. Scott Lamothe, *State Policy Adoption and Content: A Study of Drug Testing in the Workplace Legislation*, 37 ST. & LOC. GOV'T REV. 25, 26 (2005) (discussing 1980s increase in private employers testing employees for drug use).

37. *See* Rothstein, *supra* note 20, at 71 (noting private sector joined "war on drugs" after public employers began testing); Peter J. Boyer, *ABC to Start Drug Tests*, N.Y. TIMES, Jul. 10, 1987, *available at* http://www.nytimes.com/1987/07/10/arts/abc-to-start-drug-tests.html?ref=peterjboyer (noting Capital Cities/ABC only major broadcast network screening prospective employees for drugs). In 1983, 3% of the

Either due to its convenience or legislative concerns over individual privacy rights, urinalysis has become the most common means of testing.[38] Urinalysis is considered less invasive than blood testing and more reliable than hair testing, reducing privacy concerns raised by these other types of tests.[39] A study conducted in 1997 suggested that urinalysis comprised 97% of all employer-conducted drug tests.[40]

The reasons and circumstances under which employers may test for drugs vary by state and within industries.[41] There are at least six common circumstances, however, under which employers test for drugs: pre-employment, post-accident, routine, return-to-duty, reasonable suspicion, and random drug testing.[42] Insomuch as an employer's interest in testing an applicant is greater than testing an employee, pre-employment testing is often considered the least objectionable form of testing, and the most likely to withstand constitutional challenge.[43] In contrast, random suspicionless drug testing of current employees is the most controversial form of drug testing, and its constitutionality has often been linked to the nature of the position at issue,

nation's largest companies had drug-testing programs; that number was expected to grow to 50% by the end of 1987. Boyer, *supra*; *see also* Penny Singer, *In Search of a Drug-Free Workplace*, N.Y. TIMES, Apr. 26, 1987, *available at* http://www.nytimes.com/1987/04/26/nyregion/in-search-of-a-drug-free-workplace.html (discussing implementation of drug testing at Simmonds Precision in January 1987).

38. *See* BEVERLY A. POTTER & J. SEBASTIAN ORFALI, PASS THE TEST: AN EMPLOYEE GUIDE TO DRUG TESTING 12-17 (1999) (discussing different types of drug tests, including urine, blood, hair, breath, saliva, and sweat). Potter and Sebastian note the inherent unreliability of hair testing, highlighting that second-hand exposure can cause positive test results: "So if your old man (or old lady!), for example, has been smoking dope around you, especially in a small confined place . . . you can be sure that it has been absorbed in your hair." *Id.* at 17; *see also* Hannah K. Knudsen et al., *Organizational Compatibility and Workplace Drug Testing: Modeling the Adoption of Innovative Social Control Practices*, 18 SOC. F. 621, 623 (2003) (indicating urine, blood and hair substances screened for presence of "metabolites of illegal psychoactive substances"); *Hair Tests: Unreliable and Discriminatory*, ACLU (June 27, 1999), http://www.aclu.org/drug-law-reform/hair-tests-unreliable-and-discriminatory (asserting evidence proves color bias exists in hair testing).

39. *See* Knudsen et al., *supra* note 38, at 623 (stating urinalysis most common type of testing due to concerns regarding other types of testing). Urinalysis is preferred because of the highly invasive nature of blood testing and the unreliability of hair testing. *Id. But see infra* note 122 and accompanying text (indicating Boston Police Department currently tests hair follicles).

40. *See* Theresa K. Casserly, Note, *Evidentiary and Constitutional Implications of Employee Drug Testing Through Hair Analysis*, 45 CLEV. ST. L. REV. 469, 470 (1997) (citing study claiming vast majority of drug tests conducted through urinalysis).

41. *See infra* Part II.C. (discussing scope of state statutes).

42. *See* POTTER & ORFALI, *supra* note 38, at 6-11 (stating reasons for testing include accident investigation, work fitness, mass screening, pre-employment, and probable cause); Rothstein, *supra* note 20, at 65 n.41 (summarizing 1990 study conducted by Helen Axel for Corporate Experiences with Drug Testing Conference Board). Ninety-two percent of the companies responding to Axel's survey conducted pre-employment testing; 74% conducted for-cause testing; 42% conducted post-rehabilitation testing; 28% conducted periodic testing; and 9% conducted random testing. Rothstein, *supra* note 20, at 65 n.41; *see also* Jill Dorancy-Williams, Comment, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing*, 28 N.M. L. REV. 451, 468-80 (1998) (noting varying circumstances under which employers test for drugs).

43. *See* Dorancy-Williams, *supra* note 42, at 469 (suggesting drug testing acts as legitimate hiring inquiry because of "legitimate concerns" about safety).

and whether safety concerns create a high degree of regulation in the industry.[44]

The response to testing has been mixed.[45] Testing has been credited with successfully reducing the incidence of drug use, in both the military and civilian work force.[46] Nevertheless, many employees and some courts find the tests too invasive, inaccurate, or inefficient to withstand constitutional scrutiny, among other things.[47]

B. Mounting a Defense to Drug Testing: The Federal Constitutional Framework

Opponents of employee drug testing frequently raise concerns regarding the constitutionality of drug testing programs.[48] Such concerns are typically

44. *See id.* at 477 (stating reasonable random testing may occur in highly regulated industries where employees have diminished privacy expectations).

45. *Compare* Joseph B. Treaster, *Testing Workers for Drugs Reduces Company Problems*, N.Y. TIMES, Oct. 10, 1993, *available at* http://www.nytimes.com/1993/10/10/nyregion/testing-workers-for-drugs-reduces-company-problems.html (reporting drug testing programs sharply reduce drug use in factories and offices), *with* Jay Romano, *Plan to Test Firefighters and Police for Drugs Is Questioned*, N.Y. TIMES, Apr. 22, 1990, *available at* http://www.nytimes.com/1990/04/22/nyregion/plan-to-test-firefighters-and-police-for-drugs-is-questioned.html (noting concerns about tests' reliability and accuracy).

46. *See* Knudsen et al., *supra* note 38, at 623 (noting deterring employee drug use purported to have additional substantial benefits for employers); Richard Halloran, *Drug Use in Military Drops; Pervasive Testing Credited*, N.Y. TIMES, Apr. 23, 1987, *available at* http://www.nytimes.com/1987/04/23/us/drug-use-in-military-drops-pervasive-testing-credited.html (indicating military officers credited reduction in drug use to pervasive use of urinalysis). William Current, director of the Institute for a Drug-Free Workplace, stated that "[t]he increase in the number of companies conducting drug testing, and the overall decrease in the percentage of 'positive' drug test results indicate that drug testing works." Noble, *supra* note 33.

47. *See* Robert H. Faley et al., *Drug Testing in the Public and Private-Sector Workplaces: Technical and Legal Issues*, 3 J. OF BUS. & PSYCHOL. 154, 159-62 (1988) (discussing imprecision and other administrative and technical problems with drug testing); John Gilliom, *Rights & Discipline: Competing Modes of Social Control in the Fight over Employee Drug Testing*, 24 POLITY 591, 592 (1992) (indicating many forensic scientists and attorneys agree with employees arguing counterproductive impact of testing). For-cause testing, or testing based on individualized suspicion, is the least susceptible to constitutional challenge, while mandatory, random, and suspicionless testing is the most susceptible. *See infra* Part II.B (highlighting cases interpreting constitutionality of drug testing); *see also supra* note 10 (collecting cases); *infra* note 87 (collecting cases).

48. *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616 (1989) (noting physical intrusions infringe upon social expectation of privacy); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 671 (1989) (holding public interests must be weighed against interference with individual liberty from requiring urine test); Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1229-30 (2004) (positing special needs balancing test suffers from "generalized deficits" of all balancing tests); Ashdown, *supra* note 7, at 773-78 (indicating drug testing constitutes substantial intrusion on civil liberties); Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 489-90 (2007) (opining privacy primary inquiry and searches upheld only on warrant or individualized suspicion); Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 513-15 (2004) (indicating Court adopted deferential approach deeming most searches reasonable regardless of privacy invasion); Jennifer A. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 556-57 (1997) (arguing against special needs test as warrant and probable cause requirements best protect privacy interest); Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 448 (2000)

couched in terms of perceived lack of accuracy, effectiveness, or notice by the employer.[49] Drug testing through urinalysis constitutes a search and seizure under the Fourth Amendment and analogous provisions of state constitutions.[50] Opponents argue that such tests—especially tests not based on a reasonable suspicion of drug use, i.e., suspicionless testing—violate the constitutional prohibition on unreasonable searches and seizures.[51]

The Supreme Court has upheld the constitutionality of such testing, however, on the grounds that the Fourth Amendment's warrant and probable cause requirements do not apply in such cases, based on the "special needs" doctrine first announced in *New Jersey v. T.L.O.*,[52] a case involving a principal's warrantless search of a student's purse.[53] The *T.L.O.* Court held that requiring school officials to fulfill the normal warrant requirement of the Fourth Amendment would frustrate the "swift and informal disciplinary procedures needed in the schools."[54] Instead, the governing standard should be one based on "the reasonableness, under all the circumstances, of the search."[55] Justice Blackmun, in his concurrence, described it thusly: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[56]

The special needs exception to the warrant and probable cause requirement of the Fourth Amendment has generated much criticism.[57] This is particularly

(characterizing application of special needs doctrine as ad-hoc and arbitrary). *See generally* Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719 (2007) (advancing more principled framework to evaluate constitutionality of suspicionless searches).

49. *See* Dorancy-Williams, *supra* note 42, at 468-69 (noting distinctions between situational bases for testing and whether notice provided).

50. *See Skinner*, 489 U.S. at 617 (holding collection and testing of urine intrudes upon privacy interests). In reaching its conclusions, the *Skinner* Court directly quoted the Fifth Circuit's statement that "[t]here are few activities in our society more personal or private than the passing of urine. . . . It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *Id.* (quoting Nat'l Treasury Emps. Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1985)); *see also* Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 532 N.E.2d 644, 648 (Mass. 1989) (holding requiring urine sample constitutes search and seizure for constitutional purposes).

51. *See Skinner*, 489 U.S. at 653-54 (Marshall, J., dissenting) (asserting decision will reduce privacy all citizens enjoy); Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526-27 (Mass. 1991) (warning court does not approve nonconsensual taking of blood or urine absent particularized basis).

52. 469 U.S. 325 (1985).

53. *See id.* at 341 (upholding school official's warrantless search of student's purse based on reasonable suspicion).

54. *Id.* at 340 (holding school environment allows modifying warrant requirement to uphold search).

55. *Id.* at 341 (discussing circumstances under which search in school environment will be held constitutional).

56. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (citing examples of circumstances when courts may substitute warrantless balancing test for warrant, probable-cause requirement).

57. *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 635-55 (1989) (Marshall, J., dissenting)

true in the context of employee drug testing, which the special needs balancing test was later used to justify, as discussed below.[58]

Four years after the Court handed down its decision in *T.L.O.*, it took up the issue of employee drug testing in the companion cases of *Skinner v. Railway Labor Executives' Ass'n*[59] and *National Treasury Employees Union v. Von Raab*.[60] *Skinner* upheld testing of railroad workers involved in accidents,[61] while *Von Raab* upheld testing of Customs Service employees seeking promotions or transfers to positions involving drug interdiction or requiring the employee to carry a firearm.[62] The Court justified the employee drug testing at issue in *Skinner* and *Von Raab* based on the special needs balancing test first articulated in *T.L.O.*[63] In particular, the *Skinner* Court held that:

> The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[64]

The Court went on to determine that the "governmental interest in ensuring the safety of the traveling public . . . plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called

(criticizing majority's use of special needs doctrine to uphold suspicionless drug testing). In his dissent, Justice Marshall asserted that "[c]onstitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not." *Id.* at 637. Justice Marshall cautioned that the majority had substituted the probable cause requirement with a "manipulable balancing inquiry under which, upon the mere assertion of a 'special need,' even the deepest dignitary and privacy interests become vulnerable to governmental incursion." *Id.* at 640-41; *see also* Arcila, Jr., *supra* note 48, at 1232-34 (arguing special needs jurisprudence lacks predictability or any discernable stopping point); Ashdown, *supra* note 7, at 763 (suggesting war on privacy began with War on Drugs, not War on Terror); Butterfoss, *supra* note 48, at 489-90 (noting Court privacy analysis should be controlling factor in balancing test, not government purpose); Sundby, *supra* note 48, at 549-50 (opining special needs balancing test opened door to "unintended mischief"); Buffaloe, *supra* note 48, at 556-57 (suggesting identified need should be assessed for compelling nature separate from privacy interest at stake).

58. *See* O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1151 (1990) (Liacos, C.J., concurring) (noting case could be disposed "without resort to a manipulable balancing inquiry"). Chief Justice Liacos asserted that the court's reliance on balancing public interests against privacy interests, particularly with respect to drug testing, continues to erode the state constitutional protection against unreasonable searches and seizures. *Id.*

59. 489 U.S. 602 (1989).

60. 489 U.S. 656 (1989).

61. *See Skinner*, 489 U.S. at 608-09 (noting regulations prohibit covered railroad employees from reporting for service impaired).

62. *See Von Raab*, 489 U.S. at 659-60 (discussing implementation of drug-screening program of customs operatives carrying firearms).

63. *See Skinner*, 489 U.S. at 620 (upholding drug testing based on special needs balancing test).

64. *Id.* (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).

for duty."[65] Further, railway employees' participation in an industry "that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of the covered employees" diminishes their expectation of privacy.[66] In balancing the employee's expectations of privacy against the government's interest, the Court held the government's interest outweighed the employee's reasonable expectation of privacy due to the safety-sensitive nature of the position.[67] In highly regulated, safety-sensitive fields, the compelling governmental interest in testing without showing individualized suspicion generally outweighs the diminished privacy expectations.[68]

C. Marshaling the Troops: States' Legislative and Judicial Responses

Around the time Congress passed the 1988 Act, states legislatures began to regulate workplace drug testing as well.[69] Between 1987 and 1997, twenty-seven states adopted such legislation.[70] The statutes adopted differ in their coverage and stance, whether pro- or anti-drug testing.[71] Most drug testing statutes apply to private-sector employees only, and relate to workers' compensation.[72] Some state statutes, including those adopted in Florida, Georgia, Kansas, Nebraska, Oklahoma, Minnesota, Montana, South Dakota, and Tennessee, treat public-sector employees as well.[73] An analysis of these

65. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 621 (1989).

66. *Id.* at 627.

67. *See supra* notes 59-66 and accompanying text (discussing *Skinner* and *Von Raab* holdings).

68. *See Skinner*, 489 U.S. at 627-28 (suggesting covered employees principal focus of regulatory concern); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 670 (1989) (discussing national interest in ensuring physical fitness of front-line interdiction personnel). The *Von Raab* Court noted that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." 489 U.S. at 670.

69. *See* Lamothe, *supra* note 36, at 26 (noting nine states enacted drug testing legislation in 1987). Those states included Connecticut, Iowa, Louisiana, Minnesota, Montana, Oregon, Rhode Island, Utah, and Vermont. *Id. See generally* MARK A. DE BERNARDO & MATTHEW F. NIEMAN, GUIDE TO STATE AND FEDERAL DRUG-TESTING LAWS (15th ed. 2008) (summarizing private-sector state drug testing laws).

70. *See* V. John Ella, *What Do They Have in Mind? Minnesota's Drug-Testing Law Turns 20*, BENCH & B. MINN., Sept. 2007, at 22, 22-23 (indicating twenty-seven states, Puerto Rico, and two cities enacted specific drug testing statutes and regulations); Lamothe, *supra* note 36, at 30 (highlighting adoption years of state workplace drug testing acts). *See generally* DE BERNARDO & NIEMAN, *supra* note 69 (summarizing private-sector drug testing laws).

71. *See* Ella, *supra* note 70, at 23 (noting Minnesota, New England and Puerto Rico "anti-drug testing," Mid-western and Southern states "pro-drug testing"); Lamothe, *supra* note 36, at 26 (noting Louisiana statute pro-business, Connecticut pro-labor, Oregon neutral); *cf.* Dahlia Fahmy, *Small Business; Aiming for a Drug-Free Workplace*, N.Y. TIMES, May 10, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0CE3D61731F933A25756C0A9619C8B63 (noting workplace drug testing programs gaining popularity but random testing remains fairly rare).

72. *See generally* DE BERNARDO & NIEMAN, *supra* note 69 (summarizing state private-sector drug testing laws).

73. *See* John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 813 (2000) (noting laws in Nebraska, Oklahoma, Montana, and Minnesota relate to public sector employees); *Drug Testing in the Workplace*, NAT'L WORKRIGHTS INST., http://workrights.us/?products=drug-testing-in-the-workplace (last visited Mar. 4, 2011) (noting laws in Florida, Georgia, Kansas, South Dakota,

states' drug testing laws is set forth below.

The statutes vary in form, scope and substance, including the types of testing permitted, the basis for such testing and the conditions to which the tests are subjected.[74] For instance, Minnesota and Montana regulate public and private employers by defining "employer" broadly; Nebraska regulates only "governmental organizations"; and Oklahoma defines "public" and "private" employer separately.[75] The scope of the statutes similarly vary in terms of the definition of "drug": Tennessee cross-references the regulations adopted by the United States Department of Transportation; Florida specifically enumerates alcohol and other substances, including hallucinogens and opiates; Montana and Oklahoma define and regulate "alcohol" and "drugs" separately.[76] Only Florida has set forth legislative findings regarding the serious adverse effects of drugs on the workforce.[77] Some states have explicitly recognized the interaction between drug testing laws and public-sector employees' collective bargaining agreements by noting the employee protections under existing bargaining agreements are unaffected by the law, or requiring such testing be negotiated under new agreements.[78]

and Tennessee relate to public sector employees); *see also, e.g.*, FLA. STAT. § 112.0455(2)(a) (2007) (promoting goal of "drug-free workplaces within government through fair and reasonable drug testing methods"); GA. CODE ANN. § 45-20-110 (2010) (authorizing drug testing in accordance with federal guidelines for applicants to public employment); KAN. STAT. ANN. § 75-4362(b) (2007) (authorizing director of personnel services to establish drug screening program for, among others, safety-sensitive positions); MINN. STAT. § 181.950(13) (2005) (defining "safety-sensitive position" as job in which drug impairment threatens health or safety of any person); MONT. CODE ANN. § 39-3-206(5) (2009) (defining employer as person or entity with one or more employees doing business in Montana); NEB. REV. STAT. § 48-1902(8) (2010) (defining "employer" as state of Nebraska); OKLA. STAT. tit. 40, § 554(4) (2009) (permitting random testing of police officers and public employees engaged in activities affecting others' safety); S.D. CODIFIED LAWS § 23-3-64 (2004) (defining safety-sensitive position as armed law enforcement officers, staff involved in detainee rehabilitation, treatment); TENN. CODE ANN. § 50-9-104(a) (2008) (authorizing drug testing as part of drug-free workplace programs in public and private sectors).

74. *See infra* Part III (discussing proposal for Massachusetts based on other states' law).

75. *Compare* MINN. STAT. § 181.950 (7) (2005) (defining "employer" as person or entity doing business in state, including governmental subdivisions), *and* MONT. CODE ANN. § 39-3-206 (2009) (defining employer as person or entity with one or more employees doing business in Montana), *with* NEB. REV. STAT. § 48-1902 (2010) (defining "employer" as state of Nebraska), *and* OKLA. STAT. tit. 40, § 552 (2009) (defining "employer" and "public employer").

76. *Compare* FLA. STAT. § 112.0455(5)(a) (2007) (defining drug as alcohol, cannabinoids, cocaine, hallucinogens, opiates, barbiturates, designer drugs, etc.), *and* TENN. CODE ANN. § 50-9-103(6) (2008) (defining "drug" as controlled substances subject to testing by Department of Transportation), *with* MONT. CODE ANN. § 39-3-206 (2009) (separately defining alcohol and controlled substances), *and* OKLA. STAT. tit. 40, § 552 (2009) (defining "alcohol" as ethyl alcohol or ethanol, and drug separately).

77. *See* FLA. STAT. § 112.0455(3)(a) (2007) (setting forth findings regarding adverse effects of drug use). The Florida legislature noted that, "[i]n balancing the interest of employers, employees, and the welfare of the general public, the establishment of standards to assure fair and accurate testing for drugs in the workplace is in the best interests of all." *Id.* § 112.0455(3)(d).

78. *Compare* MINN. STAT. § 181.955 (2005) (noting employee protections under existing collective bargaining agreements undiminished), *with* TENN. CODE ANN. § 50-9-108(g) (2008) (indicating drug and alcohol testing must be specified in collective bargaining agreements before implemented). As a matter of statutory construction, Minnesota notes that nothing in the drug testing statute should be construed to limit the

Substantive differences exist in addition to the technical and definitional variances outlined above.[79] Some states require that employers provide rehabilitative measures for employees who have tested positive for drugs, and further mandate that the employer provide assistance programs.[80] Other states ensure test results remain confidential by imposing criminal sanctions for any disclosure.[81] Most states have enacted strict guidelines governing the collection, storage, transportation and other handling of test specimens, in order to protect against contamination or adulteration.[82] Finally, states that permit random testing typically only authorize random testing of those employed in so-called safety-sensitive positions.[83] It should be noted that such tests are subject to more exacting scrutiny.[84] Montana, for instance, requires employers to obtain a signed statement from each employee subject to random testing confirming the employee received notification of the random selection process.[85] South Dakota requires that advertisements for safety-sensitive positions include a statement of the drug-testing requirements.[86]

Like the Supreme Court, state and federal courts utilize a special needs balancing test under the Fourth Amendment and state analogs in upholding suspicionless drug testing of public-sector safety-sensitive employees.[87] In the

parties to a collective bargaining agreement from agreeing with a drug and alcohol testing policy that meets or exceeds, but does not otherwise conflict with, the minimum standards set forth in its statute. MINN. STAT. § 181.955(1) (2005).

79. *See infra* Part III (noting statutory differences).

80. *See* FLA. STAT. § 112.0455(8)(n) (2007) (describing employee protections). Employers are not permitted to discharge, discipline, or discriminate against employees solely on the basis of their first positive confirmed drug test, without first giving the employee the opportunity to participate in an employee assistance program or alcohol and drug rehabilitation program. *Id.*

81. *See* S.D. CODIFIED LAWS § 23-3-68 (2004) (making disclosure of test results Class 2 misdemeanor). The persons subject to such penalties include those responsible for recording, reporting, or maintaining medical information, and who knowingly or intentionally disclose or fail to protect it, including by compelling others to disclose the information. *Id.*

82. *See, e.g.*, FLA. STAT. § 112.0455(8) (2007) (requiring collection by qualified persons at qualified laboratories); GA. CODE ANN. § 45-20-110(2) (2010) (defining "established tests" as complying with Mandatory Guidelines for Federal Workplace Drug Testing Programs); MONT. CODE ANN. § 39-2-207 (2010) (establishing criteria for qualified testing programs).

83. *See infra* Part III.B (discussing safety-sensitive requirements).

84. *See infra* Part III.D (noting random tests subject to greater scrutiny).

85. *See* MONT. CODE ANN. § 39-2-208(2)(v) (2010) (requiring such documentation furnished in employee's personnel file).

86. *See* S.D. CODIFIED LAWS § 23-3-66 (2004) (setting forth requirements for soliciting safety-sensitive employment applications). Any printed or public announcement or advertisement soliciting applications for employment in safety-sensitive positions must include a statement of the drug-testing requirements imposed on such employees. *Id.*

87. *See, e.g.*, Hatley v. Dep't of Navy, 164 F.3d 602, 604 (Fed. Cir. 1998) (upholding drug test of firefighter as "the safety of others was in his hands"); Aubrey v. Sch. Bd. of Lafayette Parish, 148 F.3d 559, 564-65 (5th Cir. 1998) (noting random drug testing of custodians motivated by protecting "our most important resource—children"); Rushton v. Neb. Pub. Power Dist., 844 F.2d 562, 566 (8th Cir. 1988) (balancing privacy interests against government's need for search of nuclear power plant employees); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (holding special needs exception applies to warrantless breath and urine testing of racing jockeys); Miller v. Vanderburgh Cnty., 610 N.E.2d 858, 861-62 (Ind. Ct. App. 1993) (holding no

case of private sector employees, courts consider similar issues under the protections of state constitutional privacy provisions.[88] Courts upholding suspicionless drug testing stress the sensitive nature of the positions involved to such a degree that the requirement of individualized suspicion proves dispensable.[89] In upholding the constitutionality of such tests, courts generally reason that the employees' reasonable expectations of privacy are diminished due to the nature of their position.[90] The government's interest—in safety, in citizen welfare, and in preventing disasters that might occur if employees in such positions did their jobs while intoxicated or otherwise impaired—is correspondingly enhanced.[91] Under this line of analysis, states have generally upheld the constitutionality of suspicionless drug testing of both public- and private-sector employees in positions involving the public safety.[92]

Some state courts, however, distinguish among the circumstances that authorize the testing, for example, post-accident, random, suspicionless, or otherwise.[93] To the extent courts have refused to uphold the constitutionality of

reasonable suspicion necessary to test courthouse security deputy); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 23 (N.J. 1992) (holding safety-sensitive nature of oil refinery employment outweighs privacy rights).

88. *See* Faley et al., *supra* note 47, at 172 (noting private-sector employees can bring lawsuit based on constitutional privacy provisions, other federal statutes).

89. *See supra* notes 10, 87 (collecting state and federal appeals court cases upholding constitutionality of employee drug testing). The Eighth Circuit in *Rushton* noted that, "where the state interest is so great and the private interest so diminished . . . individualized suspicion is not required." 844 F.2d at 567. The Federal Circuit in *Hatley* stated, "It is generally established that employees responsible for the safety of others may be subjected to drug testing, even in the absence of suspicion of wrongdoing." 164 F.3d at 604. In *Miller*, the Indiana Court of Appeals noted that it was "convinced the government has a compelling interest in insuring that those individuals who secure Indiana's courthouses—with the use of deadly force, if necessary—be stone-cold sober," in upholding the testing of security deputies without a reasonable suspicion of drug use. 610 N.E.2d at 862-63.

90. *See* Paul R. Koster, *Workplace Searches by Public Employers and the Fourth Amendment*, 39 URB. LAW. 75, 81-82 (2007) (noting nature of position one factor courts assess in determining employee's reasonable expectation of privacy). Other factors courts consider include office practices, procedure and legitimate regulations, and the public employee's dominion and control over his or her workspace. *Id.* at 79-82.

91. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 670-71 (1989) (discussing public interest). The *Von Raab* Court reasoned that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 671; *see also* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 628 (1989) (noting inherent risks to public in railway positions). The *Skinner* Court noted that railway workers "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." 489 U.S. at 628; *see also* City of Annapolis v. United Food & Commercial Workers, Local 400, 565 A.2d 672, 681 (Md. 1989) (stating police officers' and firefighters' unique duties require immediate response to protect public).

92. *See supra* notes 10, 87 and accompanying text (identifying state and federal appeals courts holding drug testing constitutional).

93. *See, e.g.*, Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 384-85 (6th Cir. 1998) (reversing lower court decision finding suspicionless testing of school teachers unconstitutional, affirming suspicion-based testing); Capua v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986) (requiring reasonable suspicion to conduct drug tests of firefighters and police department employees); Oman v. State, 737 N.E.2d 1131, 1146 (Ind. 2000) (holding post-accident drug testing of driver constitutional).

drug testing, they typically premise such refusal on the per se unreasonableness of random suspicionless testing.[94] Some courts—including the Alaska Supreme Court, relying on the Massachusetts Supreme Judicial Court's contra decision in *Guiney*—have found mandatory pre-employment and suspicion-based testing constitutional, but draw the constitutional line at random, suspicionless testing.[95] Even under a special needs balancing test, courts require a minimum quantum of suspicion to consider the testing reasonable, and thus constitutional.[96] Some courts find the government's interest in suspicionless testing minimized because any danger posed by drug use is hypothetical at best, and unsubstantiated at worst, such that it does not outweigh even the limited privacy interests at stake.[97] Alternatively, some have reasoned that the testing was too intrusive, an objection typically based on the nature of the position at issue.[98] Other courts have held explicitly that the positions at issue are not safety-sensitive, and therefore do not justify the imposition on the employee's privacy.[99]

94. *See* Anchorage Police Dep't Emps. Ass'n v. Municipality of Anchorage, 24 P.3d 547, 559 (Alaska 2001) (holding random suspicionless testing of police officers unconstitutional); Petersen v. City of Mesa, 83 P.3d 35, 39 (Ariz. 2004) (opining random testing of firefighters furthers only "generalized, unsubstantiated interest" regarding "hypothetical" problem); Timm v. Reitz, 39 P.3d 1252, 1258 (Colo. App. 2001) (noting dog training duties pose no substantial risks to national security).

95. *See Knox Cnty. Educ. Ass'n*, 158 F.3d at 384-87 (holding suspicionless testing of school teachers unconstitutional, suspicion-based testing constitutional); *Anchorage Police Dep't*, 24 P.3d at 557-59 (upholding constitutionality of pre-employment and post-accident testing, determining suspicionless testing unconstitutional). As the Supreme Court of Alaska noted in *Anchorage Police Dep't*, "many other courts have upheld suspicionless testing that include random testing components," yet specifically indicated that *Guiney* was not one of these instances. *See* 24 P.3d at 559 n.79; *see also* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523 (Mass. 1991); *infra* Part II.D.1 (discussing *Guiney* at length).

96. *See Guiney*, 582 N.E.2d at 526-27 (holding mandatory random suspicionless drug testing of Boston police officers unconstitutional). *See generally supra* Part II.A (explaining objections to employee drug testing).

97. *See supra* notes 93-95 and accompanying text (discussing cases holding employee drug testing unconstitutional).

98. *See* Luck v. S. Pac. Transp. Co., 267 Cal. Rptr. 618, 630-31 (Cal. Ct. App. 1990) (holding railroad employee not safety employee as defined by *Skinner* and *Von Raab*); Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n, 532 N.E.2d 644, 651-52 (Mass. 1989) (holding random drug testing of horse jockey unreasonable).

99. *Compare* Patchogue-Medford Cong. of Teachers v. Bd. of Educ., 505 N.Y.S.2d 888, 891 (N.Y. App. Div. 1986) (teachers not safety-sensitive employees under applicable law), *and* Ga. Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990) (enjoining pre-employment drug testing of applicants for state employment), *with* Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 378 (6th Cir. 1998) (refusing to read definition of "safety-sensitive" narrowly to preclude teachers due to responsibility of position), *and* Aubrey v. Sch. Bd. of Lafayette Parish, 92 F.3d 316, 319 (5th Cir. 1996) (remanding on issue of whether janitor occupied safety-sensitive position).

D. The Eastern Front: Drug Testing in Massachusetts

1. Balancing the Public Safety: Drug Testing in the Public Sector After O'Connor *and* Guiney

House Bill 2210 is not the Massachusetts legislature's first attempt at regulating employee drug testing—the legislature refused to add a drug testing rider to bills regulating employee polygraphs in 1985.[100] For the last several years, House Representative Anne Gobi has sponsored a bill to prevent private employers and the state government from requiring drug testing as a condition of employment, which have understandably stalled in light of the penalties placed upon employers for violations of the same.[101] To date, courts have determined the scope of employee drug testing absent any affirmative legislative direction.[102]

In *O'Connor v. Police Commissioner of Boston*,[103] the Massachusetts Supreme Judicial Court (SJC) held that suspicionless drug testing of a police cadet, who had consented to testing as a condition of employment, constituted neither an unreasonable search or seizure, nor an unreasonable invasion of the employee's privacy.[104] The court employed the special needs balancing test first announced by the United States Supreme Court in *T.L.O.*, and further applied to safety-sensitive employment positions in *Skinner* and *Von Raab*, to conclude that the suspicionless testing of the police cadet was not unreasonable within the meaning of article XIV of the Massachusetts Constitution or under chapter 214, section 1B of the Massachusetts General Laws.[105] In so doing, the court noted that "drug use by police officers has the obvious potential, inimical to public safety and the safety of fellow officers, to impair the perception, judgment, physical fitness, and integrity of the users," and that "the unlawful obtaining, possession, and use of drugs cannot be reconciled with respect for

100. *See* Thomas L. McGovern, III, Note, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1480-82 (1987) (discussing drug testing rider to 1985 Massachusetts House Bill regulating use of polygraphs by employers). The rider ultimately failed. *See id.* at 1481. McGovern notes that the American Civil Liberties Union of Massachusetts made a new proposal to be introduced at the first annual legislative session of 1987, requiring certain procedural safeguards, probable cause based on objective facts showing impairment on the job, and a clear and present danger to safety. *See id.* at 1489. McGovern further presaged that the "political course of any drug-testing proposal in Massachusetts will be heavily influenced by the result of current efforts to implement drug testing of Boston's police force." *Id.* at 1482.

101. *See* H.R. 1807, 186th Gen. Court, Reg. Session (Mass. 2009) (prohibiting drug testing except when required by federal law or regulation); H.R. 1792, 184th Gen. Court, Reg. Session (Mass. 2007) (making employer's testing for drugs a felony).

102. *See infra* notes 103-120 and accompanying text (discussing Massachusetts decisions regarding constitutionality of employee drug testing).

103. 557 N.E.2d 1146 (Mass. 1990).

104. *Id.* at 1150.

105. *Id.* at 1149-50 (balancing intrusiveness of urinalysis to police cadet against public interest in discovering police drug use).

the law."[106]

One year later, in *Guiney v. Police Commissioner of Boston*,[107] the SJC seemingly reversed itself.[108] It justified the changed result by emphasizing that the police cadet in *O'Connor* consented to drug testing as a condition of employment, while in *Guiney*, Boston Police Department Rule 111 (Rule 111) authorized testing on *both* a suspicionless and reasonable suspicion basis.[109] The plaintiff did not challenge the provisions of Rule 111 authorizing reasonable suspicion testing.[110] Although the court explicitly recognized that Rule 111 was constitutional under the Fourth Amendment, it held the Rule unconstitutional under the Massachusetts Constitution.[111] Rejecting the Supreme Court's holding in *Von Raab*, the SJC asserted, "Article 14 . . . should not be a casualty in the war on drugs. It is at times when pressures on constitutional rights are greatest that courts must be especially vigilant in the protection of those rights."[112] The majority suggested that the court had "never approved the nonconsensual taking of blood or urine of a person in the absence of a demonstrated, particularized basis for doing so."[113] Further, the court warned that it would not "infer or assume the existence of facts that might justify the governmental intrusion."[114] For such testing to be held constitutional, the *Guiney* Court held, it cannot:

> fairly be supported by unsubstantiated possibilities. If the government is to meet the requirements of art. 14, it must show at least a concrete, substantial governmental interest that will be well served by imposing random urinalysis on unconsenting citizens. In such a case, the justification for body searches, if there ever can be one, cannot rest on some generalized sense that there is a drug problem in this country, in Boston, or in the Boston police department and that random urinalyses of police officers will solve, or at least help to solve, the problem or its consequences.[115]

106. *Id.* at 1149.

107. 582 N.E.2d 523 (Mass. 1991).

108. *See id.* at 526-27 (holding drug testing unconstitutional). The *Guiney* court noted constitutional safeguards "should not be abandoned simply because there is a drug problem in this country." *Id.* at 526.

109. *Compare* O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1149-50 (Mass. 1990) (holding warrantless, suspicionless urinalysis of consenting police cadets not unreasonable under article XIV), *with Guiney*, 582 N.E.2d at 526-27 (holding random suspicionless urinalysis of public officers violates article XIV).

110. *Guiney*, 582 N.E.2d at 524 (noting cause of action solely under article XIV and directed at random tests only).

111. *Id.* The SJC recognized that the same Fourth Amendment issue had already been decided by the First Circuit in *Guiney v. Roache*. *Id.*; *see also* Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir. 1989) (vacating, under *Von Raab* and *Skinner*, earlier decision that Rule 111 violated Fourth Amendment). The *Guiney* Court nonetheless held that random urinalysis violates article XIV. *See* 582 N.E.2d at 526-27.

112. *Guiney*, 582 N.E.2d at 526.

113. Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526 (Mass. 1991).

114. *Id.*

115. *Id.*

However, the court used precisely that justification in *O'Connor*—an opinion issued by the same court, consisting of the same justices—the previous year.[116] Therein, the court highlighted the safety-sensitive nature of the officers' positions, and expressly rejected the concurring justices' position that suspicionless testing was permissible *only* because the cadet in question had given his consent.[117] Despite the *O'Connor* court's seemingly clear endorsement of random, suspicionless drug testing of public-safety employees regardless of consent, the SJC distinguished *Guiney* on precisely those grounds one year later: the plaintiff had not given his consent to testing, and so it was unreasonable and thus unconstitutional.[118] Dissenting Justices Nolan, Lynch and O'Connor—the majority in *O'Connor*—offered a stinging rebuke of the *Guiney* majority's failure to recognize the safety-sensitive nature of police officers' employment and the correspondingly high public interest.[119] One year prior, the court had recognized this interest and found it sufficiently compelling to uphold random drug testing.[120]

As a result of the *Guiney* holding, and absent any law mandating drug testing of public-safety employees, drug testing has been addressed at the local level, resulting in a patchwork of contracts across municipalities and public-safety positions.[121] The Boston Police Department and the Boston Patrolman's

116. O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1149-50 (Mass. 1990) (characterizing public confidence in police as social necessity).

117. *See id.* at 1150 (noting concurrence's reliance on plaintiff's consent). Instead, the safety-sensitive nature of the plaintiff's position was paramount to the court's decision. *See id.* The *O'Connor* Court wrote:

> Surely, the plaintiff would not be barred from relief if his consent to be the subject of a search and seizure were unreasonably required as a condition of employment. For example, if the plaintiff were seeking employment as a laborer, the State could not constitutionally require his consent to urinalysis testing as a precondition to such employment, and any consent given would be ineffective.

Id.

118. *Guiney*, 582 N.E.2d at 525 (distinguishing *O'Connor* based on plaintiffs' consent to drug testing).

119. Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 530 (Mass. 1991) (O'Connor, J., dissenting) (arguing *O'Connor*'s premise of public safety outweighing privacy interests properly decided). In dissent, Justice O'Connor wrote:

> It is strange indeed that, in the *O'Connor* case, the court recognized the public interest in discovering and deterring drug use by cadets, but now it fails to recognize the same public interest or a greater one in discovering and deterring drug use by permanent police officers whose conduct has impact on public safety, police safety, law enforcement, and public confidence much more than does the conduct of cadets.

Id. at 532.

120. *O'Connor*, 557 N.E.2d at 1149 (holding drug testing reasonable within meaning of article XIV).

121. *See An Act Relative to Public Safety Employees—Drug Testing: Hearing on H.R. 2210 Before the J. Comm. on Pub. Safety & Homeland Security*, 186th Gen. Court, Reg. Session (Mass. 2009) (statement of Sam Tyler, President, Bos. Mun. Research Bureau), *available at* http://www.bmrb.org/content/upload/Testimony62509.pdf (noting current process of negotiating testing individually with each union). Tyler

Association negotiated a collective bargaining agreement that provides for mandatory, but not random or suspicionless drug testing.[122] More recently, the Boston Fire Department agreed in collective bargaining arbitration negotiations with the City of Boston to undergo mandatory, random drug and alcohol testing; in return, firefighters received 2.5% pay raises, later reduced to 1.5% by the Boston City Council.[123]

2. Balancing an Employer's Legitimate Business Interest: Drug Testing in the Private Sector

Private-sector drug testing does not implicate the constitutional issues raised by public-sector drug testing.[124] In Massachusetts, the Privacy Act governs drug testing by private employers.[125] However, in the context of drug testing safety-sensitive personnel, both the Privacy Act and article XIV, like the Fourth Amendment, employ a balancing inquiry: the Privacy Act weighs an employee's reasonable expectation of privacy against the employer's legitimate business interest in public safety, while article XIV weighs that employee's expectation against the government's interest in public safety.[126] The constitutional inquiry has been subject to much criticism due to precisely this

testified that the current system of arbitrating drug testing policies "has created a patchwork system of standards across the state, where the strength or existence of a program is dependent on a community's financial ability to negotiate an agreement." *Id.* Tyler also noted, "Other municipal employees who drive municipal vehicles are required by federal law to hold a Commercial Drivers License and to submit to a random drug and alcohol testing program. No less a standard should be required of uniformed public safety officers in Massachusetts." *Id.*

122. *See* City of Boston v. Deputy Dir. of the Div. of Emp't & Training, 794 N.E.2d 1259, 1260 n.4 (Mass. App. Ct. 2003) (reciting terms of collective bargaining agreement after earlier version of Rule 111 struck down in *Guiney*). These tests are conducted annually, using hair follicles, within thirty days of an officer's birthday. *See id.*

123. *See* Andrew Ryan, *Boston, Fire Union Reach Deal on Raises*, BOS. GLOBE, June 9, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/06/09/boston_fire_union_reach_deal_on_raises (identifying one-percent reduction in raises as key component of compromise between firefighters and city). Ryan noted that the raise, referred to as a "quid pro quo" for testing, had sparked fierce criticism. *Id.*; *see also* Andrew Ryan, *Firefighters' Award Aired at Contentious Hearing*, BOS. GLOBE, June 2, 2010, *available at* http://www.boston.com/news/local/breaking_news/2010/06/by_andrew_ryan_2.html [hereinafter Ryan, *Firefighters' Award*] (discussing arbitration contract including two and half percent salary increase discussed on June 1, 2010). Councilor Sal LaMattina from East Boston told members of the hearing, "Today I can't support this. . . . A lot of people are calling me up and they don't want to pay for drug and alcohol testing. We don't pay the public works guys. We don't pay the transportation guys for drug testing. And we shouldn't." Ryan, *Firefighters' Award*, *supra*.

124. *See* James B. Conroy, *Workplace Drug Testing in Massachusetts*, 83 MASS. L. REV. 105, 110 (1998) (indicating government employers, not private employers, subject to constitutional restraints on searches and seizures); *see also* Bally v. Northeastern Univ., 532 N.E.2d 49, 51 n.3 (Mass. 1989) (noting private and public drug testing "emphatically differ as to applicable law and legal analysis").

125. *See* MASS. GEN. LAWS ch. 214, § 1B (2009) (codifying common law concept of privacy).

126. *Compare* O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1149 (Mass. 1990), *and* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526-27 (Mass. 1989), *with* Webster v. Motorola, Inc., 637 N.E.2d 203 (Mass. 1994), *and* Folmsbee v. Tech Tool Grinding & Supply, Inc., 630 N.E.2d 586 (Mass. 1994).

flexible construct.[127] Furthermore, the SJC has relied on public-sector decisions upholding employee drug testing programs to uphold drug testing of private employees.[128] Private-sector decisions are relevant for these reasons. More recent Massachusetts private-sector decisions establish that, while public safety may not rise to the level of a compelling state interest sufficient to justify the random, suspicionless drug testing of public-safety employees, public safety does, in fact, constitute a legitimate business interest which may outweigh an employee's reasonable expectation of privacy.[129]

In *Folmsbee v. Tech Tool Grinding & Supply, Inc.*,[130] the SJC upheld the defendant employer's suspicionless testing program in the face of claims by the employee that it violated the Massachusetts Civil Rights Act and the Privacy Act.[131] The court noted that the nature of the employer's business required "extreme alertness and precision" and that the company's drug testing program demonstrated concern for the safety of its employees and customers.[132] The court reasoned it previously upheld drug testing when balancing a public employee's interest in privacy.[133] In so doing, it relied on *O'Connor*'s reasoning rather than *Guiney*'s, despite the fact that the arguably distinguishing factor between *O'Connor* and *Guiney*—employee consent—was not present in *Folmsbee*.[134]

The court upheld *Folmsbee* in *Webster v. Motorola*,[135]a case in which two employees of Motorola Communications and Electronics, Inc. (Motorola), brought claims under the Massachusetts Civil Rights Act and the Privacy Act, arguing that the company's random, suspicionless drug testing violated their constitutional and statutory rights.[136] The court held that the drug testing program did not violate the privacy rights of the employee whose job duties arguably had "safety-sensitive" features, in that the job required he drive a company-owned vehicle approximately 25,000 miles per year.[137] Although the

127. *See supra* note 57 and accompanying text (noting criticism of special needs balancing inquiry).

128. *See infra* text accompanying note 134 (indicating *Folmsbee* Court relied on *O'Connor* Court's reasoning).

129. *See generally Webster*, 637 N.E.2d 203 (upholding private employer's drug testing program based on *Folmsbee*); *Folmsbee*, 630 N.E.2d 586 (holding private employer's drug testing program constitutional based in part on *O'Connor*).

130. 630 N.E.2d 586 (Mass. 1994).

131. *See id.* at 588 (reciting facts pertaining to employee drug testing program); *see also* MASS. GEN. LAWS ch. 12, § 11I (1992) (providing private cause of action when constitutional rights interfered with by threats, intimidation, or coercion).

132. *See* Folmsbee v. Tech Tool Grinding & Supply, Inc., 630 N.E.2d 586, 589 (Mass. 1994) (discussing employer's legitimate business interest and concerns regarding employee safety).

133. *See id.* at 589 (analogizing to *O'Connor*).

134. *See id.* at 589-91 (noting drug testing policy implemented two years after Folmsbee began work; she quit upon implementation).

135. 637 N.E.2d 203 (Mass. 1994).

136. *See id.* at 204 (describing Motorola's drug testing policy).

137. *See id.* at 207 (evaluating employer's legitimate business interest in drug testing based on nature of employees' duties).

court reasoned that Motorola's "general interest" in protecting employee safety was not a sufficient business interest to justify drug testing, Motorola had the specific interest in ensuring its employee did not operate its motor vehicle while intoxicated—an interest that included "protecting [employee's] safety and the safety of others," and rose to a level sufficient to outweigh the employee's privacy interests.[138]

These two private-sector cases make clear that the SJC has not abandoned *O'Connor*'s privacy analysis in light of *Guiney*.[139] Pursuant to *Guiney*, article XIV shields the privacy interests of public-sector safety-sensitive employees against mandatory, random, suspicionless drug testing.[140] However, an employer's legitimate business interests outweigh the privacy interests of private-sector safety-sensitive employees under the *O'Connor* Court's reasoning.[141] House Bill 2210 represents an opportunity for Massachusetts to clarify its position with regard to drug testing private and particularly public-sector employees in safety-sensitive positions.[142]

III. STATUTORY PROPOSAL

By passing House Bill 2210 in its current or any amended form, Massachusetts would be among a minority of states with any legislative regulation of public-sector employee drug testing.[143] Moreover, no state has yet to uniformly adopt private-sector drug-testing regulation.[144] The adoption of such legislation, however, may help resolve the apparent conflict between *O'Connor* and *Guiney*, or at least clarify the circumstances under which Massachusetts public-sector safety-sensitive employees may be subject to mandatory, random drug testing.[145] After *Guiney*, drug testing is subject to the employee's consent, because the public safety demands it—but even then, the nebulous and oft-critiqued public safety rationale might not support a drug testing program.[146] After *O'Connor* and *Guiney*, any public-sector drug-testing legislation should contain substantial protections for an employee's privacy.[147]

138. *See id.* at 207-08 (discussing factors involved in weighing employer's legitimate business interests).

139. *See Webster*, 637 N.E.2d at 207 (citing *Folmsbee*'s balancing test for private employers under Massachusetts Privacy Act); Folmsbee v. Tech Tool & Grinding Supply, Inc., 630 N.E.2d 586, 589 (Mass. 1994) (discussing *O'Connor* balancing test and intrusiveness of drug testing on employee privacy).

140. *See* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526-27 (Mass. 1991) (holding Rule 111 authorizing random searches unconstitutional).

141. *See supra* note 139 and accompanying text (indicating *Webster* and *Folmsbee* rely on *O'Connor*).

142. *See infra* Part III (discussing proposed amendments to House Bill 2210 in light of *O'Connor* and *Guiney*).

143. *See supra* note 73 and accompanying text (outlining state statutes regulating public sector employees).

144. *See supra* note 70 and accompanying text (noting twenty-seven states adopted drug testing regulation).

145. *See supra* note 5 and accompanying text (setting forth requirements in House Bill 2210).

146. *See supra* Part II.C (providing thorough treatment of *O'Connor* and *Guiney*).

147. *See supra* notes 103-120 and accompanying text (discussing and analyzing *O'Connor* and *Guiney* decisions).

Specifically, a model statute should contain the following: (1) legislative findings discussing the impact of drug use by public-sector employees on the public safety; (2) clear definitions of safety-sensitive positions; (3) notice requirements of testing procedures; (4) procedural guidelines; (5) a list of proscribed drugs; (6) confidentiality protections; (7) evaluation and treatment standards for employees with positive test results; and (8) provisions for potential collective bargaining issues.[148]

A. Legislative Findings Discussing the Impact on the Public Safety of Drug Use by Public-Sector Safety-Sensitive Employees

The *Guiney* Court emphasized that constitutional protections could not fall asunder to some "generalized sense" that a drug problem exists.[149] Accordingly, if Massachusetts adopts a law regulating the drug testing of safety-sensitive employees, it should follow the example that the Florida legislature set in crafting its Drug-Free Workplace Act.[150] Like Florida, Massachusetts should set forth legislative findings, substantiated by committee records, regarding the serious adverse effects of drug use upon the workforce.[151] If the legislature conducted hearings and commissioned studies into the matter—assuming the results supported drug testing of public-sector safety-sensitive employees—perhaps the *Guiney* court's concern that the state show a "concrete, substantial" government interest, resting on more than "unsubstantiated possibilities" would be satisfied.[152]

B. Clearly Defined Safety-Sensitive Positions

States have taken two positions in defining safety-sensitive positions: some create broad definitions, set by the touchstone of public safety, and others specifically enumerate which positions are safety-sensitive.[153] The definitional scope of "safety-sensitive" positions is critical because an employer's ability to conduct random testing is limited to these employees, and other special conditions are placed upon these employees.[154]

148. *See infra* Part III.A-H (setting forth proposed amendments to House Bill 2210).

149. *See supra* text accompanying note 115 (quoting *Guiney*).

150. *See supra* note 77 and accompanying text (noting Florida legislative findings introducing Drug-Free Workplace Act).

151. *See* FLA. STAT. § 112.0455(3) (2007) (reciting findings).

152. *See* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526 (1991) (stating justification for drug testing cannot rest on "generalized sense" of drug problem).

153. *Compare* FLA. STAT. § 112.0455(5)(m) (2007) (defining safety sensitive as "any position . . . in which drug impairment . . . [threatens] public health or safety"), *and* TENN. CODE ANN. § 50-9-103(16)(B) (2008) (defining "safety-sensitive position" as one which drug impairment constitutes direct threat to public safety), *with* KAN. STAT. ANN. § 75-4362(g) (2007) (enumerating classes of seven safety-sensitive positions), *and* S.D. CODIFIED LAWS § 23-3-64(2) (2004) (defining safety-sensitive position as law enforcement officer carrying firearm or prisoner custodian).

154. *See supra* note 153 (indicating different formulations of safety-sensitive positions). In Oklahoma, for

If Massachusetts adopts some version of House Bill 2210, the legislature should specifically enumerate safety-sensitive positions, as did the legislatures in Kansas, Oklahoma, and South Dakota.[155] To the extent courts use the public safety to justify governmental intrusion, public safety should not also define the scope of allowable testing; otherwise, public employers would be more susceptible to the *Guiney* Court's concern with governmental overreaching.[156] Specifically defining—and thereby limiting—the employees subject to random testing would ameliorate any such concerns.[157]

C. Interaction with Collective Bargaining

The unionization of public-sector safety-sensitive personnel may be one of the most influential reasons so few statutes cover these employees.[158] If Massachusetts adopts House Bill 2210 or some variant, the legislature should consider including language requiring approval by certified bargaining agents, similar to the Tennessee drug-testing statute, which provides that collective bargaining agreements must specify drug and alcohol testing before implementation.[159] Alternatively, the legislature should include language similar to the Minnesota statute stating that the statutory language shall not be construed to interfere with existing collective bargaining agreements.[160] Drug testing has been negotiated through collective bargaining agreements following *Guiney*.[161] Accordingly, the Massachusetts legislature should consider the interaction between a proposed drug testing law and any affected collective bargaining agreements.

D. Notice to the Employee in the Form of a Written Policy Statement

Notice to employees would conform to the holdings in *O'Connor* and

instance, testing on a random selection basis may only be required of employees who are police officers, who have drug interdiction responsibilities, are authorized to carry firearms, are engaged in activities directly affecting the safety of others, and who work in direct connection with inmates or juvenile delinquents. *See* OKLA. STAT. tit. 40, § 554(4) (2009). In Florida, on the other hand, safety-sensitive employees must be placed in non-safety-sensitive positions or on leave while completing employee assistance programs. *See* FLA. STAT. § 112.0455(8)(n)(2) (2007).

155. *See supra* notes 153-154 (discussing state statutes enumerating safety-sensitive positions).

156. *See Guiney*, 582 N.E.2d at 526 (requiring concrete governmental interest to uphold drug testing).

157. *See id.* (noting government should support privacy intrusions with concrete justifications).

158. *See supra* note 122 and accompanying text (noting Boston Police Department's collective bargaining negotiations).

159. *See* MINN. STAT. § 181.955 (2005) (discussing employees' freedom to collectively bargain and statutory construction not to interfere with existing agreements).

160. *See* TENN. CODE ANN. § 50-9-108(g) (2008) (setting forth rules related to unionized employees). The Tennessee legislature commented, "If applicable, the drug or alcohol testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before the testing is implemented. *Id.*

161. *See* supra notes 121-123 and accompanying text (discussing collective bargaining agreements after *Guiney*).

Guiney permitting mandatory, random, suspicionless drug testing of safety-sensitive personnel, subject to the employee's consent. While choosing employment in a public-sector safety-sensitive position arguably constitutes implied consent to drug testing, statutorily provided notice more clearly complies with *O'Connor*'s holding.[162] For example, employees in Montana sign statements confirming receipt of a written description of the random testing selection process.[163] Moreover, the legislature may consider adding a provision like South Dakota's, where any printed or public employment advertisement for a safety-sensitive position must include a statement of drug-testing requirements.[164] Massachusetts legislators should clarify consent guidelines in any bill adopted.

E. Procedural Guidelines

Like Georgia, Massachusetts could link its drug testing procedures to those established by the federal guidelines.[165] Alternatively, it could establish its own procedures for employee protection similar to Florida's model.[166] Florida establishes the following procedures: (1) a chain of custody by requiring, among other things, that specimen containers be labeled so as to preclude the erroneous identification of tests; (2) procedures relating to specimen collection, storage and transportation, including a provision stating that drug tests must be taken by a "qualified person in a licensed laboratory"; and (3) that positive test results be preserved for a certain period after giving notice to the employee.[167] Such procedures are aimed at reducing the invasiveness of the testing, assuring accuracy, and otherwise protecting an employee's interests.[168] Accordingly, establishing these procedures would be an important step toward satisfying the concerns the SJC raised in *Guiney*.[169]

F. Enumeration of Prohibited Drugs

Like the federal guidelines, most statutes enumerate specific drugs the tests

162. *See* O'Connor v. Police Comm'r of Bos., 557 N.E.2d 1146, 1149 (Mass. 1990) (holding cadets' consent to testing before accepting employment diminishes intrusiveness).

163. *See supra* note 85 and accompanying text (discussing Montana's notice requirements).

164. *See supra* note 86 and accompanying text (discussing South Dakota's requirements for employment solicitations).

165. *See* GA. CODE ANN. § 45-20-110(2) (2010) (defining established test as collection and testing of bodily fluids in manner equivalent to guidelines); *see also* Caplan & Huestis, *supra* note 19, at 3 (highlighting development and establishment of Guidelines for Federal Workplace Drug Testing Programs).

166. *See* FLA. STAT. § 112.0455(8)(b)(1) (2007) (requiring documentation of samples).

167. *See id.* §§ 112.0455(8)(e)(2), (h) (defining qualified persons for administering tests and recommending preservation of specimen for positive tests).

168. *See id.* § 112.0455(8) (referring to such provisions as "[p]rocedures and employee protection").

169. *See generally* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523 (Mass. 1991) (holding mandatory random drug testing of police officers unconstitutional).

are designed to detect.[170] In contrast, South Dakota prohibits merely "illegal drug use," an undefined term.[171] As it is currently written, House Bill 2210 is more analogous to the South Dakota model in that it permits drug and alcohol testing but fails to define the particular substances it is permissible to test.[172] However, defining the substances being tested puts employees on notice of the testing details and the scope of their consent.[173] It is thus preferable that Massachusetts specifically enumerate the drugs for which it approves testing. Other states have accomplished this by referencing federal law, or by specifically defining proscribed substances.[174] In so doing, the Massachusetts legislature would define the scope of the testing in accordance with *Guiney* and *O'Connor*.[175]

G. Confidentiality

To limit the article XIV and Privacy Act concerns, the legislature should require the confidentiality of all results and other information obtained through the course of drug testing.[176] Florida requires that employers, laboratories, assistance programs, and their agents release information concerning drug test results only with a written consent form signed voluntarily by the employee.[177] Severe penalties may be imposed for breach of confidentiality—in South Dakota, for example, a knowing or intentional breach of confidentiality by persons responsible for recording, reporting, and maintaining medical information constitutes a Class 2 misdemeanor.[178] It is not clear, however, that such ramifications are necessary to ensure compliance with the confidentiality

170. *See* FLA. STAT. § 112.0455(5)(a) (2007) (defining "drug"). Florida defines a drug as "alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein." *Id.*

171. S.D. CODIFIED LAWS § 23-3-65 (2004) (providing implementation of drug screening program based on reasonable suspicion of illegal drug use).

172. *See supra* note 5 and accompanying text (discussing current provisions of House Bill 2210).

173. *See, e.g.*, MINN. STAT. § 181.950(5) (2005) (defining drug and alcohol testing for purpose of measuring presence or absence of drugs); NEB. REV. STAT. § 48-1902(2) (2010) (permitting breath tests of defined substances); OKLA. STAT. tit. 40, § 552(7) (2009) (defining drug and alcohol test as chemical test for drugs, defined substances).

174. *Compare* MONT. CODE ANN. § 39-2-206(3) (2010) (defining drugs by referencing Code of Federal Regulations), *with* OKLA. STAT. tit. 40, § 552(6) (2009) (including in definition of "drug" amphetamines, cannabinoids, cocaine, phencyclidine, hallucinogens, methaqualone, opiates, barbiturates, benzodiazepines, synthetic, designer drugs, and metabolites).

175. *See supra* note 117 and accompanying text (discussing *O'Connor* Court's reliance on employee consent).

176. *See* FLA. STAT. § 112.0455(11) (2007) (requiring drug test results kept confidential and forbidden from use in evidence).

177. *Id.* § 112.0455(11)(b) (requiring consent form contain name, purpose, precise information, duration of consent, and signature of employee).

178. S.D. CODIFIED LAWS § 23-3-68 (2004) (making punishable knowing or intentional disclosure of such information).

requirement. For example, Oklahoma merely requires that employers maintain the records separately from personnel records.[179] House Bill 2210 should contain confidentiality requirements regarding drug test results, and the Massachusetts legislature should ensure their compliance by way of civil statutory remedies as in Oklahoma. By doing so, the legislature may alleviate some of the privacy concerns with drug testing raised in *Guiney*.[180]

H. Evaluation and Treatment of Employees with Positive Drug Test Results

Some state statutes require employers to offer drug evaluations, education, and treatment programs prior to authorizing any punitive measures as a result of positive drug tests.[181] In Florida, this means that employers cannot take disciplinary action against employees as a result of a positive drug test until they have provided the employee with an opportunity to participate in an employee assistance or drug rehabilitation program.[182] In Oklahoma, on the other hand, disciplinary action is permitted after a first positive test result is confirmed by a second, more accurate method of testing.[183] In Montana, this second test is referred to as the employee's "right of rebuttal."[184]

These measures further serve to protect an employee's privacy interests, as mandated by *Guiney*.[185] Massachusetts, in the very least, should require a second, more accurate test to confirm the initial results, and provide employees with a forum and an opportunity to rebut the first positive test results.[186] Furthermore, Massachusetts could require employers to provide rehabilitative

179. *See* OKLA. STAT. tit. 40, § 560 (2009) (setting conditions for maintaining confidentiality of test results). Records are considered the property of the employer and are only released after an employee expressly grants permission, or pursuant to a valid court order. *Id.* § 560(B). Testing facilities are similarly prohibited from disclosing to the employer other information that the test may relate, including whether the employee is pregnant. *Id.* § 560(C).

180. *See supra* notes 107-120 and accompanying text (discussing privacy concerns raised in *Guiney*).

181. *See* KAN. STAT. ANN. § 75-4362(d) (2007) (setting limits on termination). Specifically, the Kansas legislature requires that no person who has not previously tested positive shall be terminated as a result of a positive test, provided that they undergo a drug evaluation and successfully complete any education or treatment programs recommended as a result of the evaluation. *Id.*

182. *See* FLA. STAT. § 112.0455(8)(n) (2007) (noting opportunity at employee's expense or covered by health insurance plan). Upon successfully completing the program, the employee must be reinstated at the same or an equivalent position. *Id.* § 112.0455(8)(o).

183. *See* OKLA. STAT. tit. 40, § 562(A) (2009) (requiring second test using gas chromatography, gas chromatography-mass spectroscopy, or equivalent more accurate method). Employers are also permitted to take disciplinary action against employees who refuse to undergo testing. *Id.* § 562(B).

184. *See* MONT. CODE. ANN. § 39-2-209 (2010) (requiring employer to obtain additional test of split sample by independent lab upon employee's request). The employer is required to pay for the test if the additional results are negative, and the employee is required to pay if the additional results are positive. *Id.* The employer must provide an employee with the opportunity to rebut or explain the results of any test. *Id.* If an employee presents a reasonable explanation or medical opinion for the positive results, the test results must be removed from the employee's record and destroyed. *Id.* § 39-2-210.

185. *See* Guiney v. Police Comm'r of Bos., 582 N.E.2d 523, 526 (Mass. 1991).

186. *See supra* notes 183-184 and accompanying text (providing Oklahoma and Montana second-test guidance).

programs, and require that no adverse employment action be taken against an employee on the basis of a positive test, unless the employee refused to participate in any such program.[187] In keeping with *Guiney*, these measures would reduce the potential punitive effect of the tests while also serving the employee's interests.[188]

IV. CONCLUSION

The SJC's holding in *Guiney v. Police Commissioner of Boston* seems incongruous with Massachusetts's precedent, as well as precedent of other states. However, the decision remains the touchstone for assessing the reasonableness of public-sector drug-testing programs in the Commonwealth. Accordingly, if the Massachusetts legislature adopts House Bill 2210, or any modified version thereof, it will be necessary to revise the bill, or for the Secretary of the Executive Office of Public Safety and Security to promulgate guidelines, reflecting the constitutional concerns raised by the *Guiney* Court in order to avoid being struck down as unconstitutional. The legislature should revise the bill to avoid any possible conflict with *Guiney* by drawing on other states' public-sector safety-sensitive formulations. Massachusetts' adoption of a revised House Bill 2210 would ensure, as *O'Connor* dictates, that those charged with the responsibility of enforcing the law respect it, while nonetheless protecting their privacy interests, as mandated by *Guiney*.

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187. *See supra* note 182 and accompanying text (discussing Florida rehabilitative programming guidelines).

188. *See supra* notes 93-95 and accompanying text (indicating timing, basis, and existence of rehabilitative process all possible constitutional bars to testing).