
THERE'S A PILL FOR THAT! STATE LAW APPROACHES TO WORKPLACE DRUG TESTING POLICY IN THE AGE OF PRESCRIPTION OPIOIDS

Katie Meikle[†]

INTRODUCTION

In a hypothetical community the approximate size of South Bend, Indiana—population 100,000—fourteen people die each year from an opioid overdose.¹ About six of *those* deaths are attributed to prescription opioids.² One in two citizens in the community who is prescribed drugs misuses them,³ and one in three citizens used prescription opioids in the past year, whether acquired through a doctor's prescription or illegal means.⁴ These statistics are not merely illustrative: they approximate national data on what is known in modern parlance as the “opioid epidemic.”⁵

The American fixation with opioids has been labeled a “public health emergency”⁶ by the federal government. Like crack cocaine and methamphetamine in

[†] J.D. Candidate, University of Notre Dame Law School, 2019; B.S. in Health Science Studies with a Minor in Addiction Studies, Boise State University, 2012. Thank you to the Journal of Legislation for publishing this piece. I would like to extend my sincere gratitude to Professor Barbara Fick for the inspiration to write it and for guidance throughout the project. Special thanks, also, to my writing guru – Grace Meikle – for her advice, and to my greatest advocate – Theodore Wunderlich – for his loyal support in all of my law school endeavors.

¹ This calculation is based on the statistic that 130 Americans die every day from opioid overdose. *Opioid Crisis*, NAT'L INST. ON DRUG ABUSE (Jan. 2019), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-crisis>.

² This calculation is based on the statistic that approximately forty percent of opioid-related deaths in 2016 were attributed to prescription opioids. *About the Epidemic*, U.S. DEP'T OF HEALTH & HUM. SERV'S. (Jan. 22, 2019), <https://www.hhs.gov/opioids/about-the-epidemic/index.html>.

³ This calculation is based on the results of a study of 3.4 million drug monitoring lab results, which demonstrated that half of the individuals tested misused their prescription drugs. *Half of Americans Tested Misuse Their Prescription Medications, According to Quest Diagnostics Analysis*, QUEST DIAGNOSTICS (Sept. 6, 2017), <http://newsroom.questdiagnostics.com/2017-09-06-Half-of-Americans-Tested-Misuse-Their-Prescription-Medications-According-to-Quest-Diagnostics-Analysis>. Misuse was defined in the study as taking prescribed drugs in a manner “inconsistent with [a] physician's instructions.” *Id.*

⁴ This calculation is based on the statistic that one in three Americans took prescription opioids in 2015, which were most commonly obtained from a physician, friend, or relative. Corky Siemaszko, *One in Three Americans Took Prescription Opioid Painkillers in 2015, Survey Says*, NBC NEWS (July 31, 2017), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/one-three-americans-took-prescription-opioid-painkillers-2015-survey-says-n788246>.

⁵ See Marc Lewis, *The Truth About the U.S. “Opioid Crisis” – Prescriptions Aren't the Problem*, THE GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/truth-us-opioid-crisis-too-easy-blame-doctors-not-prescriptions>.

⁶ Chris McGeal, *Trump Declares Health Emergency Over Opioids but No New Funds to Help*, THE GUARDIAN (Oct. 26, 2017), <https://www.theguardian.com/us-news/2017/oct/26/trump-opioids-crisis-health-emergency-funds>.

prior decades, opioids are the “national scourge” of this day and age;⁷ but what exactly are they? Opioids belong to a class of drugs that reduces pain, including opiates (naturally-occurring opioids derived from the opium plant, such as heroin, morphine and codeine) and synthetic opioids, such as oxycodone (commonly, OxyContin), hydrocodone (commonly, Vicodin) and fentanyl.⁸ Neurobiologically, opioids reduce pain by binding to specialized proteins, called opioid receptors, in the brain.⁹ When opioids are misused, reward centers in the brain produce feelings of euphoria which, in the absence of pain, “can motivate repeated use of the drug simply for pleasure.”¹⁰ In other words, opioids are both powerful and highly addictive.

While heroin is illegal, many other opioids are routinely prescribed by doctors across the country¹¹ to manage pain associated with chronic illness, surgery recovery, or serious injury. Routine is perhaps an understatement: the United States dramatically “outpaces” every other nation in the world in opioid consumption, consuming—for example, “more than 99 percent” of the world’s supply of hydrocodone¹²—a popular prescription opioid. In recent decades there has been an uptick in the “environmental availability” of prescription opioids for the average American¹³ due to the heightened “social acceptability” of prescription opioid use for pain management and “aggressive marketing by pharmaceutical companies”¹⁴ to that end. There has been a dramatic increase in the frequency with which opioids are prescribed by doctors to treat “chronic, non-cancer pain, such as back pain or osteoarthritis” in spite of the “serious risks and the lack of evidence about their long-term effectiveness”¹⁵ in such applications. One scholar posits that cultural factors may “augment” opioid consumption in the United States; whereas other cultures may accept pain as a product of “aging and physical decay,” “an achy American might demand that his doctor fix what he sees as an avoidable problem by prescribing him opioids.”¹⁶

7 V. John Ella & Craig W. Trepanier, *Three Decades of DATWA*, 74-SEP BENCH & BAR MINN. 14, 15 (2017).

8 *Natural Opiates v. Synthetics: Are They as Dangerous?*, OPIUM.ORG (2019), <http://www.opium.org/natural-opiates-vs-synthetics-are-they-as-dangerous.html>.

9 Thomas R. Kosten & Tony P. George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, 1 SCI. PRAC. PERSP. 13, 14 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2851054/pdf/spp-01-1-13.pdf>.

10 *Id.*

11 See Yuki Noguchi, *Opioid Abuse Takes a Toll on Workers and Their Employees*, NPR (Jan. 20, 2016), <http://www.npr.org/sections/health-shots/2016/01/20/462922517/opioid-abuse-takes-a-toll-on-workers-and-their-employers> (explaining that “[h]ow often doctors choose (to prescribe prescription opioids) varies by state” with some evidence that doctors in Arkansas and Louisiana have the highest prescription rates).

12 Keith Humphreys, *Americans Use Far More Opioids Than Anyone Else in the World*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/15/americans-use-far-more-opioids-than-anyone-else-in-the-world/?utm_term=.dca789ea3cf2.

13 Nora D. Volkow, *America’s Addiction to Opioids: Heroin and Prescription Drug Abuse*, NAT’L INST. ON DRUG ABUSE (May 14, 2014), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2016/americas-addiction-to-opioids-heroin-prescription-drug-abuse>.

14 *Id.*

15 *Prescription Opioids*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 29, 2017), <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>.

16 Humphreys, *supra* note 12.

Given that millions and millions of Americans suffer from chronic pain,¹⁷ it is not a surprise that many “achy American[s]”¹⁸ comprise the American workforce and that the prescription opioid epidemic has hit employers particularly hard. According to a survey conducted by the National Safety Council (“NSC”), seven out of ten employers have felt “some effect” of prescription opioid use in the workplace, whether that be a positive employee drug test, decreased job performance, or some other consequence.¹⁹ Opioid abuse by employees costs employers \$12 billion per year.²⁰ This exorbitant figure comes, in part, from “higher [workers’] compensation costs,” “[higher] health insurance premiums,” and “increased employee turnover.”²¹ According to the NSC, healthcare costs for employees who misuse prescription drugs “are three times higher than for an average employee.”²² All of that is just the tip of the iceberg: “liability for industrial accidents or product defects or workplace injuries” involving prescription opioids add more still to the pool of potential costs to employers.²³

There has been substantial academic discussion and vigorous debate about the role that workplace drug testing can play in addressing employer concerns with respect to employee drug use, generally. After all, employers need a way to protect their businesses from the potentially harmful consequences of employee drug use. Employees, however, have an interest in preventing unnecessary interference with their personal lives, recreational activities, and/or medical needs²⁴: interests that are at least as compelling as their employers’. This Note adds to the existing discussion on workplace drug testing with an analysis of the unique policy challenges posed by employee prescription opioid use.

There are many potential mechanisms for addressing the problems posed by

17 Andrea M. Garcia, *State Laws Regulating Prescribing of Controlled Substances: Balancing the Public Health Problems of Chronic Pain and Prescription Painkiller Abuse and Overdose*, 41 J.L. MED. & ETHICS 42, 42 (2013) (explaining that chronic pain affects 116 million adults in the United States).

18 See Humphreys, *supra* note 12.

19 Deborah A.P. Hersman, *How the Prescription Drug Crisis is Impacting American Employers*, NAT’L SAFETY COUNCIL (2017), <https://www.nsc.org/Portals/0/Documents/NewsDocuments/2017/Media-Briefing-National-Employer-Drug-Survey-Results.pdf>.

20 Genevieve Douglas, *Opioid Addiction at Work Major Challenge for Employers*, BLOOMBERG BNA (Mar. 14, 2017), <https://www.bna.com/opioid-addiction-work-n57982085155/>.

21 *Id.* (paraphrasing Dr. Todd Simo, Chief Medical Officer for HireRight, an employment background check firm).

22 *Drugs at Work: What Employers Need to Know*, NAT’L SAFETY COUNCIL (2017), <https://www.nsc.org/work-safety/safety-topics/drugs-at-work>.

23 Katie Zezima & Abby Goodnough, *Drug Testing Poses Quandary for Employers*, N.Y. TIMES (Oct. 24, 2010), <http://www.nytimes.com/2010/10/25/us/25drugs.html> (quoting Mark de Bernardo, senior partner at Jackson Lewis, an employment law firm) (emphasis added).

24 See, e.g., Stacy Hickox, *It’s Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL’Y REV. 419 (2017) (discussing issues with workplace drug testing related to medical marijuana legalization); see also John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 814–32 (2000) (providing a detailed inquiry into legal issues surrounding private employer drug testing).

drugs in the workplace, generally,²⁵ and with respect to prescription opioids, specifically.²⁶ This Note will discuss just one such mechanism: mandatory state drug testing guidelines. The reason for this focus is twofold.

First, mandatory state drug testing guidelines have the potential to clarify the expectations of both employers and employees, thereby protecting the interests of both. From a public policy standpoint, it is important to address the conflict between employers and employees *ex ante* to avoid socially burdensome litigation down the road, which will necessarily compound the horrific impact that the prescription opioid epidemic has already had on this country.

Second, state law largely constitutes the legal landscape for restrictions on private sector workplace drug testing, providing the few—if any—limitations on employment-at-will that exist in this context. Thus, from a legal realism perspective, state law is the inevitable jumping-off point for policymakers going forward as they endeavor to strike the best balance between the interests of employers and employees related to employee prescription opioid use.

Part I of this Note will further develop the debate surrounding workplace drug testing, focusing solely on the private sector. This focus clearly encapsulates the dichotomy between employment-at-will and employee autonomy, without foraying into the constitutional issues that influence the same discussion in the public sector. Furthermore, in focusing exclusively on the private sector, this Note seeks to limit the discussion to state law mechanisms for regulating workplace drug testing, without delving into the further complexities added by federal regulation.

Part II of this Note will then discuss how the issues surrounding workplace drug testing in the private sector are uniquely manifested by employee prescription opioid use, as compared to problem drugs of the past.

Finally, Part III will explore the state law legal framework for workplace drug testing, focusing on how mandatory drug testing guidelines can help resolve policy concerns and thereby address just one piece of the massive social problem that is the prescription opioid epidemic.

No existing state drug testing law is perfect as written, and the state law mechanism is limited by design in terms of the goals it can achieve; to begin with, state drug testing laws have limited reach in the public sector, for example. Notwithstanding, this Note concludes that state law has the potential to play an important role in striking the balance between the policy objectives of employers and employees: a balance made all the more sensitive by the unique problems raised by prescription opioids. On the one hand, many states are already on the right track in terms of laws that address these problems. State policymakers can learn from each another going forward as to how to better improve the balance between competing employer and employee objectives. On the other hand, states that have thus far failed to address the issue of workplace drug testing with respect to prescription opioids are advised

25 See, e.g., Anne M. Rector, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011 (1986) (proposing standards for national legislation on workplace urinalysis testing).

26 See, e.g., NAT'L SAFETY COUNCIL, THE PROACTIVE ROLE EMPLOYERS CAN TAKE: OPIOIDS IN THE WORKPLACE, (2018) available at, <https://www.nsc.org/Portals/0/Documents/RxDrugOverdoseDocuments/RxKit/The-Proactive-Role-Employers-Can-Take-Opioids-in-the-Workplace.pdf>.

to note the approaches adopted by other states through positive legislation *ex ante*, rather than leaving it to the courts to resolve these policy issues *ex post*.

I. AN OVERVIEW OF ISSUES SURROUNDING PRIVATE SECTOR WORKPLACE DRUG TESTING

This Part will discuss how and why employers drug test their employees, and the means through which employees may challenge their employers' prerogatives to do so. As one author explains it, "[t]he question is not *whether* drug use, off-duty or on-duty[,], is incompatible with employment. Rather, the question is *by what means* it is permissible to come by evidence of such drug use."²⁷ In a private sector economy based on the doctrine of employment-at-will, employers historically have had "great autonomy" in developing policies to control the workplace and disciplining employees who fail to comply.²⁸ This includes authority to develop workplace drug policies and testing programs to assess compliance with those policies; thus, "the decisions of who and when to test are mostly unfettered" for private sector employers.²⁹ Historically, drug testing became popular as testing accuracy increased and the cost of testing decreased.³⁰ The trend toward testing was also "hastened" by the federal government's promotion of "drug-free workplaces."³¹

While the law in this area generally favors employers, it is nonetheless difficult from a public policy perspective to determine where an employer's right to control the work environment *should* end and where an employee's right to do as she wishes on her own time *should* begin.³² On the one hand, from an employer's perspective, drug use by employees contributes to a loss of workplace productivity, absenteeism, increased safety risks, and increased healthcare costs and workers' compensation pay-outs.³³ When employees are intoxicated at work, "damage to equipment and products, poor job performance, employer liability to other workers, employee theft, and the possession, buying, and selling of drugs in the workplace" may result.³⁴ On the other hand, from an employee's perspective, the implementation of workplace drug policies and the use of drug testing as a mechanism for enforcing those policies

27 Victor H. Smith, *To Test or Not to Test: Is that the Question? Urinalysis Substance Screening of At Will Employees*, 14 WM. MITCHELL L. REV. 393, 394 (1988).

28 Wefing, *supra* note 24, at 815.

29 Steven O'Neal Todd, *Employee Drug Testing—Issues facing Private Sector Employers*, 65 N.C. L. REV. 832, 836 (1987).

30 *Id.*; see also Tyler D. Hartwell, Paul D. Steele, Michael T. French, & Nathaniel F. Rodman, *Prevalence of Drug Testing in the Workplace*, MONTHLY LAB. REV., Nov. 1996, at 35, available at <https://www.bls.gov/mlr/1996/11/art4full.pdf> (explaining that there was a "growing trend in the implementation of drug testing programs" amongst employers between the mid-1980s and mid-1990s).

31 Wefing, *supra* note 24, at 816; see also *Drug-Free Workplace Advisor*, U.S. DEP'T OF LAB. (last visited Jan. 31, 2018), <https://webapps.dol.gov/elaws/asp/drugfree/require.htm>.

32 Some states have adopted an aggressive approach to protecting employees on their own time, when they are not on their employers' premises, such as New York, California, and Colorado. These states prohibit discrimination by employers based on the legal off-duty conduct of their employees. See, e.g., N.Y. LAB. LAW § 201-d (McKinney 1992); CAL. LAB. CODE § 96(k) (West 1999); COLO. REV. STAT. § 24-34-402.5 (West 2007).

33 Stephen M. Fogel, Gerri L. Kornblut, & Newton P. Porter, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 559 (1988).

34 Rector, *supra* note 25, at 1011.

raises privacy and confidentiality concerns.³⁵ Accuracy is also a concern when drug tests serve as the basis for adverse employment actions.³⁶

The tension between employer and employee interests related to workplace drug testing is exacerbated by issues surrounding the testing process. In today's workplace, urine and hair tests are the most common methods of drug testing, with urinalysis being the more common of the two methods.³⁷ Commonly, workplace drug tests are conducted in two stages using a split sample. The first is a screening test, often conducted on-site using an immunoassay or "low-cost chromatography." The second is some form of "advanced chromatography," often conducted at a laboratory contracted by the employer.³⁸

Different drug testing techniques have different relative reliabilities, such that the appropriateness of using a particular test as the basis for an adverse employment action may vary. For instance, thin layer chromatography ("TLC") is "50 to 100 times" less likely than an enzyme immunoassay ("EIA") or radioimmunoassay ("RIA") "to detect the presence of a drug," and "1000 times" less sensitive than gas chromatography mass spectroscopy ("GC/MS").³⁹ Even when GC/MS—the most sensitive technique—is used, the reliability of any conclusions drawn "depend[s] on such factors as the certainty of specimen identification; specimen storage, handling, and preparation; preparation and storage of test reagents; proper cleaning and calibration of testing instruments and hardware; and the qualification and training of laboratory personnel."⁴⁰

Furthermore, even when reliable drug testing processes are used, a positive test result does not necessarily "indicate impairment" on the job.⁴¹ Rather, a positive test result establishes "some prior use" of a particular substance by the employee,⁴² as evidenced by the presence of a metabolite of that substance in the employee's system. Obviously, employers' concerns with employee drug use depend to some degree on the circumstances under which that drug use occurs; drug use on the job presents different problems from off-duty use, and off-duty *use* may present different problems from off-duty drug *abuse*. To the extent that a positive drug test cannot distinguish these different behaviors, an important policy question is raised as to "whether a positive drug test, without other evidence of negative effects of drug usage, should be the basis for important employment decisions" at all.⁴³

35 Hickox, *supra* note 24, at 421 (explaining that "forcing" employees to "provide a urine or hair specimen" raises privacy concerns for employees).

36 *See id.* at 425 (explaining that "[b]ecause drug testing does not measure impairment and frequently provides false positive test results, it fails to fulfill the interests for which employers rely on it.>").

37 Wefing, *supra* note 24, at 827–28.

38 Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON L. REV. 491, 501 (1990).

39 1 WILLIAM E. HARTSFIELD, *INVESTIGATING EMPLOYEE CONDUCT* § 3:75 (2018).

40 2 KEVIN B. ZEESE, *DRUG TESTING LEGAL MANUAL*, § 6:48 (2nd ed. 2018)(quoting *Nat'l Treasury Emp. Union v. Von Raab*, 649 F.Supp. 380 (E.D. La. 1986)).

41 Hickox, *supra* note 24 at 426.

42 *Id.* Testing for the presence of drug metabolites in an employee's system should be distinguished from testing for alcohol consumption; a breathalyzer test would indeed measure employee impairment from alcohol consumption.

43 *Id.* at 420.

At-will employees may pose legal challenges to drug testing on the common law grounds tort and contract,⁴⁴ under state constitutional protections of privacy and state laws prohibiting handicap discrimination.⁴⁵ Private sector employees do not have a cause of action under the federal constitutional protections of the right to privacy, the right to be free from unreasonable searches and seizures, or the right to due process⁴⁶; the fronts on which much public sector employee drug testing litigation has historically occurred. Private sector employees are afforded some protection at the federal level under the Americans with Disabilities Act (ADA) if they are able to demonstrate a disability within the meaning of the Act.⁴⁷ Alternatively, employees may have a cause of action under state law. State law approaches will be discussed in further detail in Part III, *infra*.

In sum, drug testing in the workplace creates tension between the interests of employers and their employees; this tension produces a minefield of potential grounds for litigation. This Note predicts that, as the effects of the prescription opioid epidemic are realized over time, courts will increasingly be tasked with resolving sticky controversies related to prescription opioid use in the workplace and will struggle to find the right balance between the competing interests of employers and employees in this context. Conversely, as this Note advocates, this tension can be resolved in some measure *ex ante* by state workplace drug testing laws, as discussed in Part III, *infra*.

II. THE PRESCRIPTION OPIOID EPIDEMIC MEETS THE AMERICAN WORKPLACE

This Part will explain the unique issues raised by drug testing for prescription opioids, considering these drugs' legal status, medicinal application, potency, and prevalence. At the present time, drug testing for prescription opioids is not prevalent; National Public Radio reports that only thirteen percent of drug screens used test for prescription opioids, according to data collected by Quest Diagnostics, a drug testing firm.⁴⁸ There is a strong incentive, however, for employers to develop effective workplace policies on prescription opioids based on the potential costs of unclear

44 Steven O'Neal Todd, Note, *Employee Drug Testing—Issues Facing Private Sector Employers*, 65 N.C. L. REV. 832, 835 (1987).

45 § 20:163: *Overview of State Laws Regulating Substance Abuse Testing*, EMP. DISCRIM. COORD., NOV. 2018 [hereinafter *Overview*].

46 See Todd, *supra* note 44, at 833.

47 The ADA specifies that current use of an illegal drug does not qualify as a disability under the Act. On the other hand, the ADA “does not exclude individuals who have successfully completed a drug rehabilitation program” or “individuals erroneously regarded as engaging in the illegal use of drugs.” Margaret C. Jasper, *Medical Examinations – Drug and Alcohol Addiction*, LEGAL ALMANAC: THE AMERICANS WITH DISABILITIES ACT § 2:20 (2012). See also Shirley v. Precision Castparts Corp., 726 F.3d 675 (5th Cir. 2013) (holding that an employee’s illegal use of prescription painkillers did not qualify for protection under the ADA). On the other hand, an employee with a qualifying disability who takes prescription painkillers as a function of that disability may be protected under the ADA. But see Elisa Y. Lee., Note, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 305 (2011) (citing Bates v. Dura Automotive Sys., 625 F.3d 283 (6th Cir. 2010) (reversing the District Court’s denial of summary judgment to the employer regarding the termination of several employees for prescription opioid use because the employees in question were not disabled so as to qualify for protection under the ADA in the first instance)).

48 Noguchi, *supra* note 11.

expectations and ensuing conflict.⁴⁹ This Note predicts that drug testing for prescription opioids will become increasingly popular in the future.

This trend will raise the same concerns as testing for any drug, as discussed in Part I, *supra*. Developing a workplace prescription opioid policy may be tricky for employers; in light of accuracy issues and the risk of false positives, opioid testing may “[fail] to fulfill the interests for which employers rely on it.”⁵⁰ Because drug tests do not actually measure on-the-job impairment, employers may be unable to distinguish via drug tests between employees who have lingering traces of medicine in their systems and employees who are “high on Percodan.”⁵¹

Drug testing for prescription opioids also raises problems that are not relevant to testing for other substances of abuse, making the issue even more complex. For one thing, the legal status of prescription opioids at both the state and federal level simply cannot be ignored, and certainly serves to distinguish prescription opioids from the “national scourge[s]” of the past as well as hot-button issues of the modern day, like medical marijuana.⁵² The main goal of most existing drug screens is “to deter employee use of illicit substances, not legal ones.”⁵³ Prescription opioids play an important role in pain control in modern American medicine, unlike other substances of abuse: a fact that is all too easily forgotten in the panic of discussing the epidemic. As Dr. Nora Volkow explained in a presentation to the Senate Caucus on International Narcotics Control, prescription opioids present a “complex problem” and demand that a balance be struck between “providing maximum relief from suffering while minimizing associated risks and adverse effects.”⁵⁴

Unlike other substances of abuse, employers may not necessarily benefit from a hardline stance against employee prescription opioid use. In some cases, an employee may use prescription opioids to counteract pain caused by her “vocation’s physical demands.”⁵⁵ Taking into account factors such as timing and dosage, “many users [can] function normally” despite the “serious risks” posed by these powerful drugs.⁵⁶ Thus, employers may actually benefit from the productivity of a workforce that has found effective ways to combat pain on the job; there is cruel irony in preventing employees from taking painkillers when the source of the pain *is their employment*. Still, common side effects from prescription opioid use can include drowsiness, reduced coordination, blurred vision, anxiety, and depression.⁵⁷ Unsurprisingly, employers of employees in safety-sensitive occupations—such as jobs involving hazardous machinery or that implicate the public health in some way, including jobs in the transportation industry—will find this disconcerting; they may not be placated by the fact that *some* employees will not suffer adverse side effects

49 See Douglas, *supra* note 20.

50 Hickox, *supra* note 24, at 424.

51 Noguchi, *supra* note 11.

52 See generally Hickox, *supra* note 24 (discussing issues surrounding workplace drug policies on medical marijuana).

53 Douglas, *supra* note 20 (paraphrasing Dr. Todd Simo).

54 Volkow, *supra* note 13.

55 Robert E. Ammons, *A Silent Epidemic*, AM. ASS’N FOR JUST, 23-FEB TRIAL 22, 23 (2017) (explaining that truck drivers often manage chronic pain associated with their occupation with prescription opioids).

56 Zezima & Goodnough, *supra* note 23.

57 Ammons, *supra* note 55, at 23.

on the job.⁵⁸

Furthermore, it may be difficult and costly for employers to police the line between stable, legitimate prescription opioid use and misuse or abuse. Because prescription opioids are so powerful, even an employee who obtained prescription opioids pursuant to a doctor's prescription can fall on a "path to dependency."⁵⁹ An employee who abuses opioids "may struggle to maintain regular attendance, achieve quality goals, or pose a safety hazard to him or herself and coworkers."⁶⁰ A publication for the American Association of Justice by attorney Robert Ammons illustrates the issue: Ammons suggested that opioid use among long-distance truck drivers increasingly leads to accidents on the road, a phenomenon he dubbed the "silent epidemic" in light of the fact that "some truck drivers, motor carriers, and even physicians fail to fully appreciate the risks associated with opioid use."⁶¹

Finally, employers may also need to be concerned about the social consequences of the policies they choose to implement. Cutting loose employees with suspected substance abuse problems may be socially problematic insofar as it denies those employees financial and social support during a time of personal crisis. Unemployment can also deepen opioid-related depression and even lead to "more drastic outcomes ... including intentional or accidental overdose."⁶² Additionally, employers should also be aware that employees may in some cases obtain prescription opioids through employer-provided health insurance, adding a layer of moral accountability to the equation, even in the absence of legal accountability. The NSC has advanced the story of a machinist named Bill Butler as a precautionary tale. Butler was prescribed hydrocodone for occupation-induced lower back pain.⁶³ "After developing a tolerance," Butler began taking methadone, one of the most potent and dangerous prescription painkillers.⁶⁴ Butler was injured at work, but overdosed at home at thirty-three years old.⁶⁵

All of these issues merit careful consideration. The ball effectively remains in the employers' courts under the prevailing doctrine of employment-at-will to establish workplace drug policies that meet their needs. To the extent that the opioid crisis

58 See Todd, *supra* note 44, at 833.

59 Edwin Foulke, Jr. & Travis Vance, *America's Opioid Epidemic and the Workplace: Should Employers Change Their Approach to Drug Testing?*, WORKPLACE SAFETY & HEALTH L. BLOG (July 31, 2017), <https://www.fisherphillips.com/Workplace-Safety-and-Health-Law-Blog/americas-opioid-epidemic-and-the-workplace-should>.

60 *Id.*

61 Ammons, *supra* note 55, at 23. On October 1, 2017, new federal mandatory guidelines for workplace drug testing became effective, including Department of Transportation authority to test for oxycodone and hydrocodone, among other "semi-synthetic opioids." See *Mandatory Guidelines for Urine Testing Updated to Include Four Semi-Synthetic Opioids*, S.A.M.H.S.A. (Sept. 29, 2017), <https://www.samhsa.gov/newsroom/press-announcements/201709291000>.

62 Foulke & Vance, *supra* note 59.

63 Sarah Trotto, *Prescription Painkillers and the Workforce: Experts Say Policies and Education Can Help Combat Opioid Abuse*, NAT'L SAFETY COUNCIL (Sept. 27, 2015), <http://www.safetyandhealthmagazine.com/articles/12932-prescription-drugs-workers>.

64 *Id.*; see also Maia Szalavitz, *Methadone: A Major Driver of Prescription Painkiller Overdose Deaths*, TIME MAG. (July 3, 2012), <http://healthland.time.com/2012/07/03/methadone-a-major-driver-of-prescription-painkiller-overdose-deaths/>.

65 *Drugs at Work: What Employers Need to Know*, NAT'L SAFETY COUNCIL (2017), <http://www.nsc.org/learn/NSC-Initiatives/Pages/prescription-painkillers-for-employers.aspx>.

is not on their “radar screens as much as it should be,”⁶⁶ employers may need to “rethink” their drug testing policies “in order to keep their employees and workplace[s] safe.”⁶⁷ The NSC recommends that employers take a “proactive role” in combatting the prescription opioid epidemic by “reevaluating” workplace drug policies and working with healthcare plan providers to “understand the extent of opioid use and the need for programs to prevent and manage opioid abuse.”⁶⁸

III. THE ROLE OF STATE LAW IN ADDRESSING THE PRESCRIPTION OPIOID PROBLEM

This Part will discuss state law approaches to workplace drug testing, first by broadly classifying these different approaches and then by explaining why the implementation of mandatory state drug testing guidelines—through positive legislation—is the best approach. Then, this Part will analyze the drug testing laws of the thirteen states with mandatory state drug testing guidelines currently enacted, highlighting specific protections that appear in these various laws that can help strike the balance between employer and employee interests related to employee prescription opioid use, to the benefit of all.

This discussion is premised on the notion that it is unreasonable to expect that employers can or will address the myriad public policy concerns discussed in Part II, *supra* on their own without legislative guidance; rather, they can be expected to act in their own interests, to minimize their own costs. Because there are so many issues surrounding drug testing for prescription opioids and the consequences of bad policy are so severe, the rule of law is needed to referee the interests of employers and employees: to protect employees while remaining sensitive to the needs of employers. Because state law provides the few, if any, limitations on employment-at-will that exist, it is the best starting point for discussing how this balance should be struck.

The state law legal landscape on workplace drug testing may be best described as a “patchwork,”⁶⁹ as states have adopted myriad approaches to regulating drug testing in the workplace. For example, some states have adopted statutes that specify drug testing policy and procedure with varying degrees of detail, while a substantial number of states have “left it to the judiciary” entirely to develop “common law rules” on the subject.⁷⁰ In general it may be noted, however, that “[state] courts have imposed very few constraints on drug testing by private sector employers.”⁷¹ Thus, by and large, restrictions on workplace drug testing have come from state legislatures, rather than the courts.

There is significant variation in the substantive content of these laws across the

⁶⁶ Zezima & Goodnough, *supra* note 23 (quoting Mark de Bernardo, senior partner at Jackson Lewis, an employment law firm).

⁶⁷ Foulke & Vance, *supra* note 59.

⁶⁸ See *The Proactive Role Employers Can Take: Opioids in the Workplace*, *supra* note 26.

⁶⁹ Hickox, *supra* note 24, at 420.

⁷⁰ Wefing, *supra* note 24, at 816.

⁷¹ Hickox, *supra* note 24, at 420.

spectrum, as well. Thirteen states have mandatory drug testing guidelines⁷² that impose legislatively-defined parameters on employers if they are to drug test their employees *at all*.⁷³ Such mandatory rules may be comprehensive in nature or merely procedural.⁷⁴ Procedural laws typically “establish procedural requirements governing specimen collection, labeling, and chain-of-custody; testing lab certification; screening and confirmed test requirements; and in some cases, specific cut-offs for positive drug testing levels.”⁷⁵ Comprehensive laws, on the other hand, “limit the circumstances under which an employer can test and regulate all aspects of testing,” thereby governing both substance and procedure.⁷⁶

Of the thirty-seven states without mandatory drug testing guidelines, some provide premium discounts for workers’ compensation insurance for employers who participate in voluntary drug-free workplace programs (DFWP).⁷⁷ There are eleven states with such programs.⁷⁸ Other states have “[s]tatutory incentives” for employers to implement drug policies, such as “a defense to a worker’s compensation claim and a defense to an unemployment compensation claim.”⁷⁹ Three states fall into this category.⁸⁰ Finally, twenty-three states have no general statute covering workplace drug testing.⁸¹ These states restrict private sector workplace drug testing through the common law, if at all, or completely “defer” to employment-at-will.⁸²

72 See *Workplace Drug Testing State Laws*, NAT’L DRUG SCREENING, INC. (2018), <https://www.nationaldrugscreening.com/>; see also CONN. GEN. STAT. ANN. § 31-51u (West 1995); HAW. REV. STAT. ANN. § 329B-1 (West 1990); IOWA CODE ANN. 730.5 (West 2017); LA. STAT. ANN. § 49:1002 (2015); ME. REV. STAT. ANN. tit. 26, § 681 (2011); MD. CODE ANN., HEALTH-GEN § 17-214 (West 2017); MINN. STAT. ANN. § 152.02 (West 2017); MONT. CODE ANN. § 39-2-206 (West 2011); NEB. REV. STAT. ANN. § 48-1902 (West 2010); OKLA. STAT. ANN. TIT. 40, § 551 (West 2011); R.I. GEN. LAWS ANN. § 28-6.5-1 (West 2013); UTAH CODE ANN. § 34-38-1 (West 2010); VT. STAT. ANN. TIT. 21, § 511 (West 2001).

73 See, e.g., ME. REV. STAT. ANN. TIT. 26, § 681(2) (2011) (“[t]his subchapter does not require or encourage employers to conduct substance abuse testing of employees or applicants. An employer who chooses to conduct such testing is limited by this subchapter, but may establish policies which are supplemental to and not inconsistent with this subchapter.”).

74 See *Overview*, *supra* note 45 (explaining that Connecticut, Iowa, Maine, Minnesota, Utah, and Vermont have comprehensive drug testing laws, while Hawaii, Louisiana, Maryland, Nebraska, Oklahoma, and Rhode Island have only procedural drug testing laws).

75 *Id.*

76 *Id.*

77 See *id.*

78 ALA. CODE. § 25-5-332 (West 1995); ARK. CODE ANN. § 11-14-112 (West 1999); ARK. ADMIN. CODE 099.00.1-099.36 (LexisNexis 2008); FLA. STAT. ANN. § 440.102(2) (West 2017); GA. CODE ANN. § 34-9-412 (West 2001); IDAHO CODE ANN. § 72-1716 (West 2003); KY. REV. STAT. ANN. § 304.13-167 (West 2000); N.Y. COMP. CODES R. & REGS. TIT. 12, § 60 (West 2009); OHIO REV. CODE ANN. § 4123.54 (West 2017); S.C. CODE ANN. § 44-107-10 (1990); TENN. CODE ANN. § 50-9-101 (West 2016); 2 WYO. CODE R. § 9 (LexisNexis 2017).

79 Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, 32-APR TENN. B.J. 20, 21 (1996).

80 See *Overview*, *supra* note 45. See ALSO ALASKA STAT. § 23.10.615 (West 1997); MISS. CODE ANN. § 71-7-3 (West 2004); ARIZ. REV. STAT. ANN. § 23-493.06 (West 1994).

81 See *Overview*, *supra* note 45. These states include California, Colorado, Delaware, Indiana, Illinois, Kansas, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Nevada, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

82 Hickox, *supra* note 24, at 420.

Table 1. *State drug testing laws by category.*

Mandatory testing guidelines⁸³	Voluntary DFWP⁸⁴	Other statutory incentives⁸⁵	No general statute⁸⁶	
Connecticut	Alabama	Alaska	California	North Carolina
Hawaii	Arkansas	Arizona	Colorado	North Dakota
Iowa	Florida	Mississippi	Delaware	Nevada
Louisiana	Georgia		Indiana	Oregon
Maine	Idaho		Illinois	Pennsylvania
Maryland	Kentucky		Kansas	South Dakota
Minnesota	New York		Massachusetts	Texas
Montana	Ohio		Michigan	Virginia
Nebraska	South Carolina		Missouri	Washington
Oklahoma	Tennessee		New Hampshire	West Virginia
Rhode Island	Wyoming		New Jersey	Wisconsin
Utah			New Mexico	
Vermont				

An examination of this “patchwork” reveals glaring gaps in employee protection.⁸⁷ Only eight percent of the American workforce is protected by mandatory drug testing laws,⁸⁸ and no state has a law that “protect[s] the employment of one who tests positive on a drug test but shows no sign of impairment at work.”⁸⁹ Even states with mandatory drug testing guidelines “generally fail to provide ... employees with any private cause of action through which they can challenge an employer’s employment decision based on a drug test that does not adhere to these standards.”⁹⁰ Essentially, this means that the state laws currently enacted that cover the vast majority of American employees do not really strike the balance between employer and employee interests at all; rather, they inevitably favor the employer.

Notwithstanding these trends, a few states have robust workplace drug testing laws that afford substantial protection to employee interests. Given that there is general inertia in the courts to abrogate employer autonomy related to workplace drug testing, positive legislation is necessary to promote uniformity and consistency in the law. Mandatory state drug testing guidelines inherently strike a more sensitive balance between the interests of employers and employees than any form of voluntary or opt-in law, given the default to employer discretion under the prevailing doctrine of employment-at-will.

In an analysis of the thirteen states with mandatory drug testing guidelines, certain patterns emerge. In particular, certain types of provisions appear in many of

83 See *supra* note 72 (listing state statutes that impose mandatory drug testing guidelines).

84 See *supra* note 78 (listing state statutes that include voluntary drug-free workplace programs).

85 See *supra* note 80 (listing state statutes with statutory incentives for employers to adopt workplace drug policies).

86 See *supra* note 81 (listing states without a general statute covering workplace drug testing).

87 Hickox, *supra* note 24, at 420.

88 *Id.* at 435–36.

89 *Id.* at 433.

90 *Id.*

these state laws, which may serve the interests of employers and employees alike, while also promoting broader social goals in this context. These key provisions are summarized below and include: A) the opportunity for an employee to provide information when an employee tests positive; B) confirmatory drug testing before an adverse employment action is taken; C) medical review officer (“MRO”) review of employee drug test results; D) limiting drug testing to circumstances of “reasonable suspicion”; E) mandatory employee assistance program (“EAP”) counseling before an employee can be terminated; and F) a private right of action for employer non-compliance with the law.

A. *The Opportunity to Provide Information when an Employee Tests Positive*

The purpose of a legislatively-mandated opportunity to provide information is to allow an employee the opportunity to justify a positive drug test result with evidence of prescribed use, so as to allay her employer’s concerns that such drug use is actually detrimental to her job. There are eight states with mandatory drug testing guidelines, which require employers to provide their employees an opportunity to identify legitimate prescription drug use or to rebut a positive drug test with information to that effect, before an adverse employment action may be taken against them.⁹¹ For example, Iowa’s drug testing law provides:

An employee or prospective employee shall be provided an opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. To assist an employee or prospective employee in providing the information described in this subparagraph, the employer shall provide an employee or prospective employee with a list of the drugs to be tested.⁹²

There are different metabolites for different types of opioids that may appear on a positive drug test; for example, the primary metabolite of heroin is different from hydrocodone.⁹³ Thus, drug tests may be able to distinguish between illicit and non-illicit *substances*, to some degree. The opportunity to provide information is important, however, because drug tests cannot distinguish between illicit and non-illicit *use*. This means that from an employer’s perspective, two positive drug tests—one from an employee taking prescription opioids pursuant to a doctor’s prescription and one from an employee who illegally obtained and is abusing prescription opioids—are indistinguishable. The potential for unfairness is manifest when adverse employment actions are taken solely based on such information.

91 *Id.* at 439. These states are Iowa, Louisiana, Maine, Maryland, Minnesota, Montana, Rhode Island and Utah.

92 IOWA CODE ANN. § 730.5(c)(2) (West 2017).

93 *Opiates*, MAYO CLINIC (2018) <https://www.mayomedicallaboratories.com/test-info/drug-book/opiates.html> (explaining that the presence of 6-MAM, a primary metabolite of heroin, is “conclusive evidence of prior heroin use” and explaining further that the primary metabolites of hydrocodone are hydromorphone and norhydrocodone).

Both employers and employees stand to benefit from fostering a workplace environment “conducive to the free exchange of information.”⁹⁴ In general, “[a]n opportunity to contest test results with other information showing a lack of impairment at work is important to protect the interests of . . . employees,”⁹⁵ but employers will also be better able to make informed decisions about their employees’ conduct when they are armed with all of the facts.

This peachy picture of cooperation is eroded somewhat by the fact that very few states actually “control an employer’s response to a positive drug test.”⁹⁶ In Louisiana, which imposes the Substance Abuse and Mental Health Administration’s (“SAMHSA”) federal drug testing guidelines on private sector employers, an MRO must contact the drug tested employee to determine if there is a legitimate medical explanation for a positive test result.⁹⁷ If a legitimate explanation exists—“e.g., a valid prescription”—the medical review officer “reports the test result as negative.”⁹⁸ Similarly, Montana prohibits “adverse action” from being taken based on a positive drug test “if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances.”⁹⁹

In other states, the ball is still in the employer’s court to act favorably or unfavorably upon the information that an employee tested positive, even for a valid medical reason. On the one hand, this approach respects employer discretion; on the other, it undermines employee privacy. It would be socially beneficial in the context of the prescription opioid epidemic for state law to model the approaches of Louisiana and Montana, such that a positive drug test is automatically excused when there is a legitimate medical explanation. This will prevent employers from unnecessarily interfering with their employees’ medical concerns and will additionally promote a relationship of trust between employer and employee.

B. *Confirmatory Drug Testing before an Adverse Employment Action is Taken*

Confirmatory drug testing alleviates some of the accuracy issues with drug testing and encourages employers to have substantiated evidence of drug use before disciplining their employees. Such a policy is the exception, not the norm, however; “in the overwhelming majority of states, a single hair or urinalysis can result in an adverse employment decision.”¹⁰⁰

Contrastingly, seventeen states require a “confirmatory test of an initial positive

94 *How Employers Can Help Address America’s Opioid Epidemic*, FISHER PHILLIPS (Sept. 5, 2017), <https://www.fisherphillips.com/resources-newsletters-article-how-employers-can-help-address-americas-opioid-epidemic>.

95 Hickox, *supra* note 24, at 458–59.

96 *Id.* at 439.

97 Mandatory Guidelines for Federal Workplace Drug Testing Programs, 80 Fed. Reg. 94, 28101 & 28105 (May 15, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-05-15/pdf/2015-11524.pdf> [hereinafter *Mandatory Guidelines*].

98 *Id.*

99 MONT. CODE ANN. § 39-2-210 (West 2011).

100 Hickox, *supra* note 24, at 437.

test result” before employers can take adverse employment actions against their employees.¹⁰¹ Of the thirteen states with mandatory drug testing guidelines discussed above, twelve explicitly require a confirmatory drug test after an initial on-site positive screening exam, unless the tested employee fails to show up for the confirmatory test.¹⁰² In the latter case, the employer may generally consider the no-show a failed test. For example, in Connecticut, the law states that no adverse employment action may be taken unless an initial urinalysis exam “utilizing a reliable methodology” yields a positive result and that result is confirmed by a “separate and independent” test using GC/MS or an equal or more reliable technique.¹⁰³ Several states, including Connecticut, explicitly require the use of GC/MS or a comparably reliable technique for all confirmatory tests.¹⁰⁴ Other state laws stipulate that confirmatory testing must be conducted at a laboratory meeting certain qualifications.¹⁰⁵ For example, under Iowa law, “[a]ll confirmatory drug testing shall be conducted” at a SAMHSA-certified laboratory.¹⁰⁶

Both employers and employees stand to benefit from the imposition of a confirmatory testing rule. From an employer’s perspective, “anything less than perfection” in the accuracy of testing procedures “affects the cost effectiveness of the program.”¹⁰⁷ Thus, confirmatory drug tests help reduce unnecessary employee turnover and protect employers’ investments in their employees. According to one article, “[a] survey of twenty-five technical experts revealed that GC/MS is the only confirmation test that, when used in conjunction with [an immunoassay], is rated [as] fully defensible against legal challenge for a wide range of drugs.”¹⁰⁸ Thus, employers may be able to better shield themselves from litigation by disgruntled former employees when a confirmatory test is mandated by law.

The potential downside of using confirmatory GC/MS testing from an employer’s perspective is its relative cost.¹⁰⁹ It is important to consider, however, that the “unavoidable result of employer reliance on inaccurate urinalysis tests” is the “discipline and discharge of some innocent employees,” which is simply a different type of cost to the employer.¹¹⁰

101 *Id.*

102 These states are Connecticut, Hawaii, Iowa, Montana, Rhode Island, Nebraska, Oklahoma, Utah, Vermont, Maine, Maryland, and Minnesota.

103 CONN. GEN. STAT. ANN. § 31-51u(a) (West 1995).

104 These states are Hawaii, Iowa, Montana, Rhode Island, Nebraska, Oklahoma, Utah and Vermont. See CONN. GEN. STAT. ANN. § 31-51u(a) (West 1995); HAW. REV. STAT. ANN. § 329B-4(6) (West 1999); IOWA CODE ANN. § 730.5(f)(1) (West 2017); MONT. CODE ANN. § 39-2-207(4) (West 2005); R.I. GEN. LAWS ANN. § 28-6.5-1(a)(4) (West 2013); NEB. REV. STAT. ANN. § 48-1903(1) (West 2000); OKLA. STAT. ANN. tit. 40, § 559(8) (West 1993); UTAH CODE ANN. § 34-38-6(6)(b) (West 2010); VT. STAT. ANN. tit. 21, § 514(6)(A) (West 2001).

105 See IOWA CODE ANN. § 730.5(e) (West 2017); HAW. REV. STAT. ANN. § 329B-5.5(3) (West 2007); ME. REV. STAT. ANN. tit. 26, § 683(5-A)(B) (2011); MD. CODE ANN., HEALTH-GEN § 17-214(f)(1)(ii) (West 2017); MINN. STAT. ANN. § 181.953(3) (West 2004); MONT. CODE ANN. § 39-2-207(4) (West 2005); R.I. GEN. LAWS ANN. § 28-6.5-1(a)(4) (West 2013); NEB. REV. STAT. ANN. § 48-1903 (West 2000); UTAH CODE ANN. § 34-38-6(6)(b) (West 2010); VT. STAT. ANN. tit. 21, § 514(6)(A) (West 2001).

106 IOWA CODE ANN. § 730.5(e) (West 2017).

107 Smith, *supra* note 27, at 407.

108 Fogel, Kornblut, & Porter, *supra* note 33, at 555–56 (internal quotations omitted).

109 Rector, *supra* note 25, at 1018.

110 *Id.* at 1068.

From the perspective of the employee, a more sensitive GC/MS test, as compared with an immunoassay—particularly when the confirmatory test is conducted at a certified laboratory rather than on-site—reduces the risk of a false positive result,¹¹¹ thereby affording the employee greater job security and protection from unfair discipline. The use of a confirmatory test via the GC/MS technique also helps to address the fact that drug tests do not actually measure impairment.¹¹² As one author explains it, neither an EIA nor a GC test in isolation can “accurately identify drug use—only the MS test can accurately identify drug *ingestion*.”¹¹³ Given the myriad procedural issues with workplace drug testing, employees can only benefit when more accurate testing techniques are mandated by law.

While the foregoing conclusions about the importance of test accuracy may be drawn with respect to any substance to be tested, the stakes are higher in the prescription opioid context for the public policy reasons discussed in Part II, *supra*. Drug testing for prescription opioids already puts employees between a rock and a hard place, in terms of protecting their job security and having the freedom to take legally prescribed medication to address their health issues. Irrespective of the employer’s prerogative to test, no party stands to gain when employees are disciplined based on false positive test results. Thus, confirmatory drug testing should be required by state law.

C. MRO Review of Employee Drug Test Results

An MRO—medical review officer—is a neutral third party who helps to ensure the medical legitimacy of drug tests. Like confirmatory drug testing, the use of an MRO is the exception rather than the norm. While “[a]ll federal agency and federally regulated drug testing programs” require the use of a MRO to “review drug test results,”¹¹⁴ only ten states require the involvement of an MRO during the drug testing process.¹¹⁵ In some states, like Montana, the role of the MRO is clearly defined to include the authority to consider prescription drug use by the employee being tested:

Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.¹¹⁶

111 See Alan E. Denenburg, *Corporate Drug Testing: Private Employers’ Right to Test*, 12 DEL. J. CORP. L. 951, 981 (1987).

112 See Hickox, *supra* note 24, at 426.

113 Rector, *supra* note 25, at 1067.

114 *Medical Review Officers—In General*, DRUG TESTING L., TECH. AND PRAC. § 4:73 (2017) [hereinafter *Medical Review Officers*].

115 Hickox, *supra* note 24, at 437. Seven states with mandatory drug testing guidelines require the involvement of an MRO, including Hawaii, Iowa, Louisiana, Maryland, Rhode Island, Oklahoma, and Vermont. *Id.*

116 MONT. CODE ANN. § 39-2-207(5) (West 2005); see also IOWA CODE ANN. § 730.5(g) (West 2017);

In some cases, an MRO may actually report a test result as negative when a positive result is justified by a legitimate medical explanation.¹¹⁷

As Hickox explains in her article, “[u]se of a . . . (MRO) is another important piece of the drug testing process to ensure the reliability of test results.”¹¹⁸ This is so because “[a] positive laboratory test result does not automatically identify an employee . . . as an illegal drug user.”¹¹⁹ The MRO, armed with “detailed knowledge of possible alternative medical explanations,” may be able to review an employee’s positive test result more sensitively than an employer otherwise would.¹²⁰ Without an MRO, and especially when employees are not guaranteed an opportunity to explain positive test results, employers can simply respond “as they see fit”¹²¹ to a positive drug test, notwithstanding that discipline in certain circumstances may neither be fair or desirable.

Without MRO review, employees lose the benefit of expert medical review that can allow for some discretion in the drug testing procedures, which the tests themselves do not provide. While a test cannot distinguish between prescription opioids obtained legitimately or illegitimately, an MRO can make that determination in favor of the employee and report a negative test result when he or she finds that a bona fide prescription has led to a positive test result. From an employer’s perspective, the use of an MRO adds to the cost-benefit analysis of a drug testing program. As Hickox explains, “[t]he absence of MRO review has been described as a source of legal liability and problems for companies and laboratories.”¹²² MRO involvement in the drug testing process is therefore essential, and should be guaranteed by state law, as a first line of defense for employers and employees alike.

D. Limiting drug testing to Circumstances of “Reasonable Suspicion”

At common law, employers have substantial leeway in deciding whom to drug test and when. Most states allow random drug testing of employees, meaning that an employee can be subjected to a drug test—thereby putting his or her job on the line—without cause. Just four of the states with mandatory drug testing guidelines listed above require employers to have some level of suspicion of employee drug use in order to test employees in the ordinary course of work, including Connecticut, Minnesota, Rhode Island, and Vermont.¹²³ A ‘suspicion’ requirement erodes some of the employer’s discretion and thereby provides greater protection to the employee. So long as the employee is not behaving ‘suspiciously’—however that is defined by

LA. STAT. ANN. § 49:1001(5) (2015); OKLA. STAT. ANN. tit. 40, § 552(11) (West 2012); VT. STAT. ANN. tit. 21, § 514(9) (West 2001).

117 Hickox, *supra* note 24, at 425; *see also* *Mandatory Guidelines*, *supra* note 97. The Mandatory Guidelines are incorporated in Louisiana’s drug testing statute.

118 Hickox, *supra* note 24, at 425; *see also* *Mandatory Guidelines*, *supra* note 97, at 28105.

119 *Medical Review Officers*, *supra* note 114.

120 *Id.*

121 *See* Hickox, *supra* note 24, at 440.

122 *Id.* at 425. (quoting Kim Broadwell, *The Evolution of Workplace Drug Screening: A Medical Review Officer’s Perspective*, 22 J.L. MED. & ETHICS, 240, 241 (1994) (internal quotations omitted)).

123 *See* CONN. GEN. STAT. ANN. § 31-51x (2016); MINN. STAT. ANN. § 181.951 subd. 4(1)-(4) (2005); 28 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(1) (West 2013); VT. STAT. ANN. tit. 21, § 513(b) (1987).

statute—the employee is safe from a drug test and an adverse employment action based thereon.

On this point, it is important to clarify that employers can test their employees for multiple different reasons in most states, even in states that generally prohibit random drug testing of employees who are not in safety-sensitive positions. For example, Minnesota law authorizes “[r]outine physical examination testing” and “[t]reatment program testing” of current employees in all occupations, in addition to reasonable suspicion drug testing.¹²⁴ The narrow issue this Note discusses here is whether *random* drug testing of employees who are not in safety-sensitive positions in the ordinary course of work is desirable.

Under Minnesota law, for example, in order to drug test an employee, there must be a reasonable suspicion that the employee is under the influence of drugs; has violated the workplace drug policy; has caused an injury to himself or others; or has otherwise caused an accident.¹²⁵ The Minnesota drug testing statute defines “reasonable suspicion” as “a basis for forming a belief based on specific facts and rational inferences drawn from those facts.”¹²⁶ There is an exception to the general rule for employees in a “safety-sensitive position” and qualifying professional athletes.¹²⁷ Minnesota law defines “safety-sensitive” jobs as those “in which impairment caused by drug or alcohol usage would threaten the health or safety of any person.”¹²⁸ Allowing random drug testing of employees in safety-sensitive positions accounts for the fact that safety is always an employer’s concern and—by the time an employer has a reasonable suspicion of employee drug use—it may be too late to avoid harm to the employee or others.

A similar, albeit more refined approach is observable under Connecticut law, which goes a step further than Minnesota law in requiring an employer who drug tests an employee to have a reasonable suspicion that the employee in question is under the influence of drugs that “adversely affects or could adversely affect such employee’s job performance.”¹²⁹ Similarly, there is an exception for employees who are in “high-risk or safety-sensitive occupation[s].”¹³⁰ Vermont’s law takes a narrower tack still by flat-out prohibiting random drug testing “except when such testing is required by federal law or regulation.”¹³¹

In the absence of any compelling justification—such as the implication of “the health or safety of any person”¹³²—random drug testing interferes with “individual autonomy and privacy”¹³³ in a way that is socially undesirable. In the public sector, random drug testing programs that do not require “at least a reasonable suspicion” of substance use “have generally been struck down as violative of the [F]ourth

124 MINN. STAT. ANN. § 181.951(4)-(6) (2005).

125 MINN. STAT. ANN. § 181.951 subd. 4(1)-(4) (2005).

126 MINN. STAT. ANN. § 181.950(12) (1991).

127 MINN. STAT. ANN. § 181.951(5) (2005); MINN. STAT. ANN. § 181.951(4) (2005).

128 MINN. STAT. ANN. § 181.950(13) (1991).

129 CONN. GEN. STAT. ANN. § 31-51x (2016) (emphasis added).

130 *Id.*

131 VT. STAT. ANN. tit. 21, § 513(b) (1987).

132 *See, e.g.,* MINN. STAT. ANN. § 181.950(13) (1991).

133 Rector, *supra* note 25, at 1070.

[A]mendment.”¹³⁴ While Fourth Amendment protections do not apply to the private sector, similar policy concerns do. Employees should be protected from interference with their personal use of legal medication to the utmost extent practicable in the modern workplace, at least until their performance is negatively impacted and/or workplace safety is threatened. State laws that require employers to have a reasonable suspicion of drug use before they test their employees—when employee intoxication would not otherwise pose an immediate health or safety risk—strike the only balance that makes sense from a public policy standpoint in the prescription opioid context. As a default, employees who are legitimately taking prescribed opioids to promote day-to-day functioning should be trusted to use their best judgment in doing so, unless their employer reasonably suspects there is a problem.

E. Mandatory EAP Counseling before Employees may be Terminated

Recognizing that addiction is a mental health issue, providing employees an opportunity to course-correct even after receiving a positive drug test result—before they are terminated— can help alleviate some of the social costs of employee drug use. Four states with mandatory drug testing guidelines—Maine, Minnesota, Rhode Island, and Vermont—require employers to provide employees who fail a drug test for the first-time counseling or access to an EAP before they may be terminated.

In Maine, for example, all employers with over twenty employees must develop an EAP and must provide an employee “who receives an initial . . . positive [test] result . . . an opportunity to participate for up to six months in a rehabilitation program designed to enable the employee to avoid future use of a substance of abuse and to participate in an employee assistance program.”¹³⁵ Similarly, in Rhode Island, drug testing is only allowed if “[e]mployees testing positive are not terminated on that basis, but are instead referred to a substance abuse professional . . . for assistance.”¹³⁶ Employees may, however, be terminated for failure to complete said counseling program.¹³⁷

The benefits of an EAP or comparable counseling program in the prescription opioid context are manifest. Importantly, EAP’s can “help identify drug abuse and provide confidential access to treatment”¹³⁸ in a context in which the line between prescribed use and problematic use can quickly become blurred by the potency and addictive quality of the drugs. From an employer’s perspective, EAP’s help to protect the investment in an employee through “training and institutional knowledge” as well as potentially realize “positive effects on productivity” by addressing an employee’s drug use.¹³⁹ For employees, “robust counseling” may enhance awareness

134 Leland B. Cross & Douglas Craig Hanley, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517, 520 (1987).

135 ME. REV. STAT. ANN. tit. 26, § 685(2)(B) (2003); *see also* ME. REV. STAT. ANN. tit. 26, § 683(1) (West 2011); *see also* MINN. STAT. ANN. § 181.953(b)(1) (West 2004); VT. STAT. ANN. tit. 21, § 513(c)(3) (West 1987).

136 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(3) (West 2013).

137 *See, e.g.*, VT. STAT. ANN. tit. 21, § 513(c)(3) (West 1987).

138 Hickox, *supra* note 24, at 460.

139 *Id.*

of the risks of opioid use and “may prevent further use from occurring.”¹⁴⁰ Most importantly, in providing an opportunity for rehabilitation, employers may help avoid some of the potential consequences of cutting loose employees suffering from addiction, which can range from counterproductive to utterly tragic.

There is some controversy as to how these programs should be provided and/or financed. Under Vermont law, for example, “a bona fide rehabilitation program” must be provided “by the employer” or be available “to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.”¹⁴¹ Conversely, under Minnesota law, the employer has a responsibility to provide an employee who tests positive an opportunity to participate in rehabilitation “at the employee’s own expense or pursuant to coverage under an employee benefit plan.”¹⁴² It is important at the very least, however, that state law require *some* rehabilitation opportunity for first-time offenders of workplace drug policies. Providing rehabilitation opportunities helps to protect employers’ investments in human capital and promotes the broader social goal of remedying the adverse effects of the prescription opioid epidemic, rather than handing off the problem to other employers or to society at large.

F. Private Right of Action for Employers’ Failure to Comply with the Statute

The existence of a mandatory drug testing law is all fine and well, but the question is, what happens to an adversely affected employee when his or her employer fails to live up to its end of the bargain? Seven of the states with mandatory drug testing guidelines as discussed above—Connecticut, Hawaii, Maine, Minnesota, Oklahoma, Rhode Island, and Vermont—provide a private right of action for violations of their respective statutes.¹⁴³ Another three states—Iowa, Louisiana, and Utah—only provide a private right of action for a false positive test result.¹⁴⁴ Uniquely, in Rhode Island, an employee may be able to obtain punitive damages for a successful claim against an employer in violation of the applicable statute.¹⁴⁵

Admittedly, from an employer’s perspective, the availability of a private right of action is not good news. Obviously, this opens employers up to potential liability. From the perspective of an employee, however, a private right of action is critical in that it gives some teeth to her concerns, which would otherwise be largely subverted to the concerns of her employer under the prevailing doctrine of employment-at-will. Although available in only a small minority of jurisdictions, such a provision is crucial to advancing the public policy issues raised throughout this Note. The threat of

140 Foulke & Vance, *supra* note 59.

141 VT. STAT. ANN. tit. 21, § 513 (1987).

142 MINN. STAT. ANN. § 181.953(10)(b)(1) (2004).

143 See CONN. GEN. STAT. ANN. § 31-51z (West 1987); HAW. REV. STAT. ANN. § 329B-7 (West 1990); ME. REV. STAT. ANN. tit. 26, § 689(1) (1989); MINN. STAT. ANN. § 181.956 (West 1987); OKLA. STAT. ANN. tit. 40, § 563 (West 2011); R.I. GEN. LAWS ANN. § 28-6.5-1(c) (West 2013); VT. STAT. ANN. tit. 21, § 519 (West 1987).

144 See IOWA CODE ANN. § 730.5(12)(a) (West 2017); LA. STAT. ANN. § 49:1012(B) (1990); UTAH CODE ANN. § 34-38-10 (West 2010).

145 R.I. GEN. LAWS ANN. § 28-6.5-1(c)(1) (West 2013).

a private right of action can help motivate employer compliance with state drug testing laws, with the result of reducing litigious conflict overall. Furthermore, by giving employees a litigatory weapon, the playing field with their employers is closer to level; this balance will promote trust and cooperation rather than suspicion and fear. The more positive the interaction between employer and employee, the more likely they are to resolve the conflict *ex ante*, without having to invoke the private right of action—and resort to litigation—at all.

Table 2. *States with mandatory drug testing laws and select statutory provisions.*

State	Opportunity to provide information	Confirmatory drug test required	MRO review	Regular random testing prohibited	EAP counseling required	Private right of action provided
Connecticut		X ¹⁴⁶		X ¹⁴⁷		X ¹⁴⁸
Hawaii		X ¹⁴⁹	X ¹⁵⁰			X ¹⁵¹
Iowa	X ¹⁵²	X ¹⁵³	X ¹⁵⁴			X ¹⁵⁵
Louisiana	X ¹⁵⁶		X ¹⁵⁷			X ¹⁵⁸

146 CONN. GEN. STAT. ANN. § 31-51u(a) (West 1995) (“No employer may (take an adverse employment action) solely on the basis of a positive urinalysis drug test unless . . . such positive test was confirmed by a second urinalysis drug test.”).

147 See CONN. GEN. STAT. ANN. § 31-51x (West 2016).

148 CONN. GEN. STAT. ANN. § 31-51z (West 1987) (“Any aggrieved person may enforce the provisions of (this statute) by means of a civil action.”).

149 See HAW. REV. STAT. ANN. § 329B-5.5(2) (West 2007).

150 See HAW. REV. STAT. ANN. § 329B-2 (West 2001) (“‘Medical review officer’ means an individual who has knowledge of substance abuse disorders and toxicology as determined by the department, and is appointed by the third party to receive, review, and interpret the results of laboratory tests requested by the third party.”).

151 See HAW. REV. STAT. ANN. § 329B-7 (West 1990).

152 IOWA STAT. ANN. § 730.5(7)(c)(2) (West 2017) (“An employee or prospective employee shall be provided an opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information.”).

153 IOWA CODE ANN. § 730.5(7)(f)(1), (2) (West 2017) (“Drug or alcohol testing shall include confirmation of any initial positive test result.”).

154 See IOWA CODE ANN. § 730.5(7)(g) (West 2017) (“‘Medical review officer’ means a licensed physician, osteopathic physician, chiropractor, nurse practitioner, or physician assistant authorized to practice in any state of the United States, who is responsible for receiving laboratory results generated by an employer’s drug or alcohol testing program.”).

155 See IOWA CODE ANN. § 730.5(12)(a) (West 2017).

156 See LA. STAT. ANN. § 49:1005(B) (2015); see also Mandatory Guidelines for Federal Workplace Drug Testing Programs, 80 Fed. Reg. 94, 28101, 94, 28105 (May 15, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-05-15/pdf/2015-11524.pdf> (“Consistent with the current (SAM-HSA) Guidelines, the MRO must contact the donor to determine if there is a legitimate medical explanation (e.g., a valid prescription) for the positive result.”).

157 LA. STAT. ANN. § 49:1001(5) (2015) (“‘Medical review officer’ means a licensed physician responsible for receiving laboratory results generated by employer.”).

158 See LA. STAT. ANN. § 49:1012(B) (1990).

Maine	X ¹⁵⁹	X ¹⁶⁰			X ¹⁶¹	X ¹⁶²
Maryland	X ¹⁶³	X ¹⁶⁴	X ¹⁶⁵			
Minnesota	X ¹⁶⁶	X ¹⁶⁷		X ¹⁶⁸	X ¹⁶⁹	X ¹⁷⁰
Montana	X ¹⁷¹	X ¹⁷²	X ¹⁷³			
Nebraska		X ¹⁷⁴				
Oklahoma		X ¹⁷⁵	X ¹⁷⁶			X ¹⁷⁷

159 ME. REV. STAT. ANN. tit. 26, § 683(8)(B) (West 2012) (“Within 3 working days after notice of a confirmed positive test result, the employee or applicant may submit information to the employer explaining or contesting the results.”).

160 ME. REV. STAT. ANN. tit. 26, § 683(7) (West 2003) (“If a screening test result is positive, a confirmation test shall be performed on that sample.”).

161 ME. REV. STAT. ANN. tit. 26, § 685(2)(B) (West 2003); *see also* ME. REV. STAT. ANN. tit. 26, § 683(1) (West 2011) (“Before taking (any adverse employment action) in the case of an employee who receives an initial confirmed positive result, an employer shall provide the employee with an opportunity to participate for up to 6 months in a rehabilitation program designed to enable the employee to avoid future use of a substance of abuse and to participate in an employee assistance program, if the employer has such a program.”).

162 *See* ME. REV. STAT. ANN. tit. 26, § 689(1) (West 1989).

163 MD. COD ANN., HEALTH-GEN. § 17-214(i)(3) (West 2017) (explaining that “if the preliminary test is positive, the applicant may voluntarily disclose and provide documentation to the operator that the applicant is taking a legally prescribed medication”).

164 MD. CODE ANN., HEALTH-GEN § 17-214(j)(1) (West 2017) (“An employer using preliminary screening procedures to test job applicants under this section shall have a medical review officer review a positive test result after laboratory confirmation of the positive test result.”).

165 MD. CODE ANN., HEALTH-GEN § 17-214(a)(8) (West 2017) (“‘Medical review officer’ means a licensed physician with knowledge of drug abuse disorders and drug and alcohol testing.”).

166 MINN. STAT. ANN. § 181.953(6)(b) (West 2004) (“If an employee or job applicant tests positive for drug use, the employee must be given written notice of the right to explain the positive test and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result.”).

167 MINN. STAT. ANN. § 181.953(3) (West 2004) (“A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test.”).

168 *See* MINN. STAT. ANN. § 181.951(4) (West 2005); *see also* MINN. STAT. ANN. § 181.951(5) (West 2005).

169 MINN. STAT. ANN. § 181.953(10)(b) (West 2004) (“[A]n employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless . . . the employer has first given the employee an opportunity to participate in . . . either a drug or alcohol counseling or rehabilitation program . . . and . . . the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program.”).

170 *See* MINN. STAT. ANN. § 181.956 (West 1987).

171 MONT. CODE ANN. § 39-2-207(5) (West 2005) (“An employee or prospective employee must be given the opportunity to provide information to the medical review officer of any medical information that is relevant to interpreting test results.”).

172 *See* MONT. CODE ANN. § 39-2-207(4) (West 2005).

173 MONT. CODE ANN. § 39-2-207(5) (West 2005) (“Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse.”).

174 *See* NEB. REV. STAT. ANN. § 48-1903 (West 2000).

175 *See* OKLA. STAT. ANN. tit. 40, § 559(8) (West 1993).

176 *See* OKLA. STAT. ANN. tit. 40, § 552(11) (West 2012).

177 *See* OKLA. STAT. ANN. tit. 40, § 563 (West 2011).

Rhode Island	X ¹⁷⁸	X ¹⁷⁹		X ¹⁸⁰	X ¹⁸¹	X ¹⁸²
Utah	X ¹⁸³	X ¹⁸⁴				X ¹⁸⁵
Vermont		X ¹⁸⁶	X ¹⁸⁷	X ¹⁸⁸	X ¹⁸⁹	X ¹⁹⁰

Based on the foregoing table and criteria described therein, Minnesota, Rhode Island and Vermont have particularly robust workplace drug testing laws insofar as they endeavor to strike the balance between employer and employee interests related to prescription opioid use. In particular, these state laws have incorporated most of the six factors identified *supra* and can therefore serve as a model for other states endeavoring to find a solution to the prescription opioid problem, as it manifests itself in the workplace.

But even these laws—exemplary as they are—are not without their critics. A brief explanation of *their* shortcomings can advance the discussion even further by showing how even the best can improve, and why state policymakers may not want to stop at merely copying others.

For example, Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA) has been criticized as “too complicated and burdensome” and “a trap for unwary employers,” even after extensive clarification by the Minnesota courts.¹⁹¹ Minnesota’s DATWA may provide an example of a law that—in providing substantial protection for employees—may have overreached the goal in failing to establish clear rights and guidelines for employees *and* their employers, so as to avoid conflict by clarifying the expectations of *both* parties *ex ante*.

The fact that Minnesota was a crusader in workplace drug testing laws also highlights a potential issue; DATWA has been around for thirty years but has “not kept up with the modern science of drug and alcohol testing when it comes to collection, laboratory, and MRO procedures.”¹⁹² A simple way to promote uniformity in the law, ensure procedural protections for employees, and reduce employer confusion would be to conform DATWA’s drug testing procedures to those found in the Department of Transportation’s (DOT) guidelines for the transportation industry.¹⁹³

178 28 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(6) (West 2013) (“Employers may require that an employee submit to a drug test if . . . [t]he employer provides the test to the employee with a reasonable opportunity to rebut or explain the results.”).

179 See 28 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(4) (West 2013).

180 See 28 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(1) (West 2013).

181 See 28 R.I. GEN. LAWS ANN. § 28-6.5-1(a)(3) (West 2013).

182 See 28 R.I. GEN. LAWS ANN. § 28-6.5-1(c) (West 2013).

183 See UTAH CODE ANN. § 34-38-6(4) (West 2010).

184 See UTAH CODE ANN. § 34-38-6-(6) (West 2010).

185 See UTAH CODE ANN. § 34-38-10 (West 2010).

186 See VT. STAT. ANN. tit. 21, § 514(6) (West 2001).

187 See VT. STAT. ANN. tit. 21, § 514(11) (West 2001).

188 See VT. STAT. ANN. tit. 21, § 513(c)(1) (West 1987).

189 See VT. STAT. ANN. tit. 21, § 513(c)(3) (West 1987).

190 See VT. STAT. ANN. tit. 21, § 519 (West 1987).

191 Ella & Trepanier, *supra* note 7, at 18.

192 *Id.*

193 *Id.* See 49 C.F.R. § 40 (2000), <https://www.ecfr.gov/cgi-bin/text->

Similarly, Rhode Island's law is considered a minefield for employers because of the severe restrictions on workplace drug testing that it imposes and the consequences of noncompliance. As one commentator has advised, "[u]nless your company is subject to statutory or other requirements to test workers for illegal drug use, we don't recommend drug testing employees in Rhode Island."¹⁹⁴ This should not be the goal of mandatory state drug testing guidelines because employers have legitimate concerns in workplace safety and productivity that ideally should be protected, as well as employee interests. Thus, Rhode Island legislators, like those in Minnesota, may need to reevaluate the system created by the law in order to strike a better, more sensitive balance between these competing interests.

Vermont—another crusader—may, like Minnesota, have failed to adapt to the modern workplace. Unlike Minnesota law, however, Vermont law may benefit from being more employee-friendly still. Although Vermont's workplace drug testing law was "innovative" at the time of its passage in 1987, commentators urge that "useful reevaluation of Vermont's law is feasible" given the "benefit of seeing what . . . other states have done" in terms of regulating private sector workplace drug testing.¹⁹⁵ Specifically, Field urged in his 1989 article that Vermont's "legislative balance between the needs of employers and the privacy rights of employees . . . should be tilted even further in favor of the latter group."¹⁹⁶ As Field explains, a legislative response is necessary to improve the law because "it is extremely unlikely that Vermont employers who currently have drug testing programs will take the initiative [to adopt employee-friendly provisions] in the absence of legislative change."¹⁹⁷

Field additionally recommended that Vermont adopt a "unique protection" available under Utah law that requires employers and managers to "submit to the testing themselves on a periodic basis."¹⁹⁸ Such a provision certainly would promote a democratic and progressive approach to workplace drug testing, thereby further eroding employment-at-will in this context. Field also recommended that the "probable cause" standard for drug testing under Vermont law¹⁹⁹ be heightened to the standard set under Rhode Island and Iowa law, which requires an employer's belief that an employee's abilities are actually impaired.²⁰⁰ This is slightly more nuanced than the

[idx?SID=44edbc0e557a4cc5ff03365810ee5b1c&mc=true&node=pt49.1.40&rgn=div5](https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC_EmployeesCoveredUnderDOTTestingRegulation49CFRPart40.pdf); see also https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC_EmployeesCoveredUnderDOTTestingRegulation49CFRPart40.pdf (providing a summary of employees covered by the DOT regulations). Currently, under Minnesota law, threshold levels advanced by SAMHSA, the College of American Pathologists (CAP), or the New York State Department of Health (NYSDH) may sustain a positive test result. CAP and NYSDH provide significantly lower metabolite threshold levels than the DOT, which may promote confusion and lead to adverse employment decisions based on positive drug test results that are not necessarily desirable for employees or employers. See Ella & Trepanier, *supra* note 7, at 16.

194 Meghan E. Siket, *No Individual Liability Under Rhode Island Drug Testing Law*, 18 No. 8 R.I. EMP. L. LETTER 2 (2013).

195 Andrew J. Field, *Jar Wars in the Green Mountain State: Vermont's Drug Testing Act Has the Potential to be the Best in the Nation*, 13 VT. L. REV. 593, 594 (1989).

196 *Id.*

197 *Id.* at 607.

198 *Id.* at 605.

199 See VT. STAT. ANN. tit. 21, § 513(c)(1) (1987).

200 Field, *supra* note 195, at 604.

point made earlier in this Note generally favoring some level of reasonable suspicion—rather than random—drug testing of employees in non-safety-sensitive positions. Field’s test would narrow the testing requirement further still to the “point where employees’ drug use, by interfering with job performance, gives rise to the employer’s need to test for drugs in order to decrease the related production costs.”²⁰¹

In sum, even those state laws that are the best equipped to address the problems raised by the prescription opioid epidemic could also be tailored further to that end. Times change, and new eras present new issues—and new problem drugs—that employers must deal with. In turn, the law must also be adaptive, so as to best meet the needs of employers, employees, and society at large at any given point in time, depending on the problems of the day.

CONCLUSION

In an ideal world, employers would not drug test their employees in the absence of legitimate concerns about workplace safety and productivity. In electing to drug test, employers would develop workplace drug policies that are both fair and clearly communicated to their employees. Likewise, employees would not abuse their employers’ trust and would respect their employers’ workplace policies because they understand the role those policies played in promoting a safe and efficient workplace. They would not contest those policies because those policies do not unnecessarily interfere with their personal lives and medical needs.

Unfortunately, as the statistics on the prescription opioid epidemic indicate, we do not live in an ideal world. Employers are wary of the enormous potential costs of prescription opioid use by their employees, and employees are wary of employers who generally have broad discretion to test and terminate. Meaningful communication and accommodation seem to have fallen by the wayside, to the detriment of both interest groups as well as society at large. The potential for conflict is abundant, and while different parties may prevail under different circumstances on different days, it is clear that at least *some* conflict could be avoided entirely by clarifying expectations *ex ante*.

Recognizing that both the employer and employee have legitimate concerns that may be difficult to balance without guidance, state law has the potential to play an important role in this regard. Employers historically have had the bulk of the power and—faced with the new threat of the prescription opioid epidemic—may be unwilling to bargain any of it away. In an environment of distrust, employees are likely to be uncooperative and leap at the opportunity to sue. Thus, state law can further overall social goals by restoring trust, guaranteeing fair procedures for employees, providing employees with substance abuse problems access to help, and providing employees a mechanism to seek redress when employers do not hold up their end of the bargain. At the other end of the spectrum, policymakers must remain cognizant of the risk that workplace drug testing laws may become overprotective or too complicated and undermine the very social goals they were enacted to accomplish.

In sum, the perfect balance is a sensitive one. But in light of the fact that so few

201 *Id.* at 606.

states have mandatory drug testing guidelines to begin with, there is certainly opportunity for improvement in the protections that state law affords employer and employee interests in this context across the board. Mandatory state drug testing guidelines with the key provisions discussed in Part III, *supra* of this Note model a progressive approach to drug testing in the workplace in the age of prescription opioids. States that have not yet implemented such laws should consider doing so, looking for inspiration in the laws of Minnesota, Rhode Island, and Vermont, among others. States with workplace drug testing laws already in place should reevaluate their chosen approaches in order to account for the unique challenges raised by the prescription opioid epidemic in the American workplace, as its effects are realized over time.