

Testing in the Workplace

Legal Forum Editors

LegalForum@chicagounbound.edu

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Testing in the Workplace

Testing in the workplace is at the center of the persistent conflict between employee rights and the right of employers to control the workplace. Employers may wish to maintain productivity by administering a battery of tests to employees, but employees may resist, asserting the protections offered by state tort remedies, federal anti-discrimination laws and the United States Constitution.

The purpose of this issue of *The University of Chicago Legal Forum* is to explore the theoretical and legal bases, as well as the practical implications, of employment testing in both the public and private sectors. The first three articles focus on the legal implications of medical screening. Professor Mark Rothstein examines the public policy aspects of medical screening and evaluates employee rights in the view and increased use of tests that detect or predict disease. Professor Richard Epstein applies a contracts analysis to the difficult question of whether private employers have the right to test employees for the AIDS virus. He proposes that employers be given freedom to contract for AIDS testing and that the cost of caring for AIDS patients be borne by society through taxation. Professor Lance Liebman discusses the application of anti-discrimination law to cases where medical screening has revealed the likelihood of future disease. Expanded employee legal rights, Professor Liebman explains, are in conflict with employers' economic interests—a conflict that law must seek to resolve.

Professor Alan Westin examines employment testing in terms of its social and political origins and predicts an era of “socially-mediated” employment testing. Professor Westin's overview of employment testing sets the stage for two noted practitioners: Paul Alan Levy, an attorney at Public Citizen Litigation Group, and Allan Adler of the American Civil Liberties Union. Mr. Adler argues that courts should examine the Fourth Amendment “reasonableness” of drug testing, the most prevalent form of employment testing, in terms of the probative value of the drug test used. Mr. Levy contends that state law remedies should supplement protections under collective bargaining agreements in safeguarding employees' rights. In the final article, Professor Elaine Shoben maintains that dissemination of the inevitable false results arising from careless or negligent testing should entitle the injured employee to a claim for defamation.

In addition to these articles, which were presented at the *Legal Forum's* December, 1987, symposium on employment testing, this volume contains a number of student-authored comments. These generally focus more closely on judicial and legislative

approaches to balancing the often disparate interests of employers, employees and society in workplace testing.