

No. 09-214

IN THE
Supreme Court of the United States of America
February Term, 2010

MAJOR LEAGUE BASEBALL,

Petitioner,

v.

KEVIN WILSON and the
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- I. WHETHER CLAIMS BROUGHT UNDER A STATE STATUTE THAT EXPRESSLY REQUIRES THE INTERPRETATION OF PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT ARE PROPERLY PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHERE THE STATE LAW WOULD FRUSTRATE THE UNIFORM FEDERAL SCHEME OF LABOR REGULATION.

- II. WHETHER AN ARBITRATOR'S AWARD MAY BE SET ASIDE AS VIOLATIVE OF A CLEAR AND DOMINANT PUBLIC POLICY AGAINST BREACHES OF FIDUCIARY DUTY WHERE THE COLLECTIVE BARGAINING AGREEMENT'S STRICT LIABILITY PROVISION EXPRESSLY PRECLUDES THAT POSSIBILITY.

CERTIFICATE OF INTERESTED PARTIES

The counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made so the Justices of the Court may evaluate any possible disqualifications or necessary recusal.

Major League Baseball, Petitioner
Kevin Wilson and Major League Baseball Players Association, Respondents

/s/ Team #29
COUNSEL FOR PETITIONER
Major League Baseball

TABLE OF CONTENTS

QUESTIONS PRESENTED..... ii

CERTIFICATE OF INTERESTED PARTIES iii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES vi

STATEMENT OF JURISDICTION..... ix

STATUTORY PROVISIONS ix

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 1

PROCEDURAL HISTORY 4

SUMMARY OF THE ARGUMENT 4

ARGUMENT..... 5

I. SECTION 301 OF THE LMRA PROPERLY PREEMPTS RESPONDENTS’
DATWA CLAIMS BECAUSE THEIR ENFORCEMENT IMPERMISSIBLY
THREATENS THE NATIONAL UNIFORMITY ESSENTIAL TO FEDERAL
LABOR POLICY AND THE INTEGRITY OF COMPETITION IN
PROFESSIONAL SPORTS NATIONWIDE..... 5

A. The Plain Terms of the DATWA Require Courts to Construe
Relevant Collective Bargaining Agreements to Determine If They
Provide Employee Protections That Meet or Exceed Those of the
Act..... 7

B. Uniform Federal Law Must Determine the Legal Ramifications
That Result from Breaches of Collective Bargaining Agreements..... 11

C. The Numerous and Varied Interpretations Required by the
DATWA Will Frustrate the National Uniformity Essential to
Federal Labor Policy, Exacerbate an Already Uneven Playing
Field, and Endanger the Integrity of Our National Pastime..... 14

II. THE ARBITRATOR’S AWARD MUST BE UPHELD BECAUSE NO
FIDUCIARY DUTY EXISTS AND FEDERAL LABOR POLICY STRONGLY
FAVORS RESOLVING DISPUTES BY ARBITRATION..... 18

A.	The League Owes No Well Defined and Dominant Fiduciary Duty to the Players to Give Particularized Warnings and Therefore Upholding the Award Does Not Violate Public Policy.....	19
B.	Uniform Federal Labor Policy Strongly Favors the Resolution of Industrial Disputes by Arbitration.....	22
CONCLUSION.....		24
APPENDIX A.....		I
APPENDIX B.....		II
APPENDIX C.....		XIV

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985).....5, 6, 7, 11, 14

E. Assoc. Coal Corp. v. United Mineworkers of Am.,
531 U.S. 57 (2000).....18, 20

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989).....14, 15, 17

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....7, 9, 11, 14

Livadas v. Bradshaw,
512 U.S. 107 (1994).....7

Muschany v. United States,
324 U.S. 49 (1945).....18, 19

Rawson v. United Steelworkers of Am.,
495 U.S. 362 (1990).....11, 12

Teamsters v. Lucas Flour Co.,
369 U.S. 95 (1962).....6, 14, 16, 17

Textile Workers v. Lincoln Mills,
353 U.S. 448 (1957).....6

United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.,
484 U.S. 29 (1987).....18, 19, 20, 22

United Steelworkers of Am. v. Enter. Wheel and Car Corp.,
363 U.S. 593 (1960).....18

W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber Workers,
461 U.S. 757 (1983).....18, 19, 22

UNITED STATES COURTS OF APPEALS

Anderson v. Ford Motor Co.,
803 F.2d 953 (8th Cir. 1986)16

<i>Coca-Cola Bottling Co. of St. Louis v. Teamsters</i> , 959 F.2d 1438 (8th Cir. 1992)	18, 22, 23
<i>Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l</i> , 861 F.2d 665 (11th Cir. 1988)	22
<i>Gore v. Trans World Airlines</i> , 210 F.3d 944 (8th Cir. 2000)	7, 8, 21
<i>Iowa Elec. Light and Power Co. v. Local Union 204 of the Int’l Bhd of Elec. Workers</i> , 834 F.2d 1424 (8th Cir. 1987)	21
<i>Stark v. Sandberg, Phoenix & Von Gontard, P.C.</i> , 381 F.3d 793 (8th Cir. 2004)	22
<i>Trs. of the Twin City Brick Layers Fringe Benefit Funds v. Superior Waterproofing, Inc.</i> , 450 F.3d 324 (8th Cir. 2006)	7, 10

DISTRICT COURT OPINIONS

<i>Holmes v. NFL</i> , 939 F. Supp. 517 (N.D. Tex. 1996)	8
<i>Stringer v. NFL</i> , 474 F. Supp. 2d 894 (S.D. Ohio 2007)	7
<i>Thompson v. Hibbing</i> , No. 08-868, 2008 U.S. Dist. LEXIS 87045 (D. Minn. Oct. 24, 2008)	12
<i>United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.</i> , 216 F. Supp. 2d 198 (S.D.N.Y. 2002).....	21
<i>Zupancich v. United States Steel Corp.</i> , No. 08-5847, 2009 U.S. Dist. LEXIS 44504 (D. Minn. May 27, 2009).....	13

STATE COURT DECISIONS

<i>Partee v. San Diego Chargers Football Co.</i> , 668 P.2d 674 (Cal. 1983).....	15
<i>Walton-Floyd v. United States Olympic Comm.</i> , 965 S.W.2d 35 (Tex. Ct. App. 1998).....	20

STATUTORY PROVISIONS

Minn. Stat. §§ 181.950 - .957 (2009).....*passim*
9 U.S.C. § 10 (2006)18
28 U.S.C. § 1254 (2006) ix
29 U.S.C. § 173 (2006)18
29 U.S.C. § 185 (2006)5

SECONDARY SOURCES

Wellington, Harry H., *Labor and the Federal System*,
26 U. of Chi.L.Rev. 542 (1959)17

STATEMENT OF JURISDICTION

The jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS

The text of the following statutory provisions relevant to the determination of the present case are reproduced in the following appendices:

Appendix A: Jurisdiction

28 U.S.C. § 1254(1) (2006).

Appendix B: Minnesota Drug and Alcohol Testing in the Workplace Act

Minn. Stat. §§ 181.950 - .957 (2009).

Appendix C: Federal Arbitration Act

9 U.S.C. § 10 (2006).

STATEMENT OF THE CASE

STATEMENT OF FACTS

There is no dispute as to the pertinent facts, which were set out at greater length in the District Court's decision and adopted in full by the Fourteenth Circuit Court of Appeals. In 2007, the Petitioner, Major League Baseball ("MLB" or the "League"), entered into the Collective Bargaining Agreement ("CBA") with all of its players, who in turn are represented for the purpose of collective bargaining by the Major League Baseball Players Association ("MLBPA"), a Respondent in the instant action. The CBA incorporates the League Policy on Anabolic Steroids and Related Substances ("Policy"), which prohibits players from ingesting numerous substances, including clomiphene, a commonly used male anabolic steroid. The Policy urges that players are strictly liable and "responsible for what is in their bodies." It cautions, "[A] positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance." It declares that banned substances "have no legitimate place" in baseball and that their use "threatens the fairness and integrity of athletic competition on the playing field."

Players who test positive are subject to discipline as outlined by the Policy, with the first violation requiring a suspension of at least fifteen but not more than twenty-five games. The Policy provides that players subject to discipline may appeal such actions to an arbitrator, whose order will be "the full, final, and complete disposition of the appeal" and "binding on all parties." Dr. John Larson, a licensed physician, directs the Policy as its Independent Administrator, while Dr. Ray Finkle serves as Consulting Toxicologist. The Policy also provides for the MLB Supplement Hotline ("Hotline"), a confidential service designed to give players an opportunity to inquire and obtain information about the permissibility of certain supplements. The

memorandum announcing the Policy specifically warns players, “Using the Hotline will not excuse a positive test result.” Appendix C to the Policy is a letter from both the League and the MLBPA addressing supplements that “strongly encourages players to avoid the use of supplements altogether” and exclaiming, “[I]f you take these products, you do so AT YOUR OWN RISK!”

Also in 2007, the League discovered that SpeedShot, a supplement that claims to provide five hours of increased energy, contained clomiphene but did not disclose its presence. Larson and Finkle received laboratory confirmation of that fact on November 14, 2007. The League then notified the MLBPA that Mega Energy Products, the distributor of SpeedShot, was a banned supplier with whom players were forbidden from doing business. Concerned that a single warning as to SpeedShot might have the effect of encouraging players to choose alternative supplements rather than avoiding them altogether, Larson sent a memorandum to all players reminding them of the dangers posed by energy-boosting supplements and “urging players not to take products or supplements that claim to provide or boost energy.” The memorandum once again stressed the Policy’s rule of strict liability, but did not mention SpeedShot by name.

Despite repeated warnings about both the strict liability associated with a positive test result and the danger of using supplements that routinely do not list all of their ingredients, Respondent Kevin Wilson (“Wilson”) took SpeedShot one morning before scrimmaging against fellow players for the Minnesota Twins. After testing positive for clomiphene, Wilson was suspended for fifteen games as required by the Policy. Around the league, four other players, from four different teams in four different states, also tested positive and received the same punishment. This led Respondents and the four additional players to appeal the suspensions to an

arbitrator pursuant to the Policy. They did not dispute the test results, but instead argued that the results should be excused because the League knew and failed to warn them of clomiphene's presence in SpeedShot. The arbitrator rejected the players' arguments, finding "no genuine dispute regarding the positive test of each player's urine sample" and applying the Policy's rule of strict liability. The arbitrator further found that the Policy imposed no obligation on the League to issue specific warnings about particular products before upholding the suspensions.

Wilson then filed suit in state court alleging numerous common law violations and breach of contract, as well as largely unspecified violations of Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA"), seeking both damages and injunctive relief to vacate the arbitral award. The DATWA lists minimum information requirements for employer drug policies, including, in pertinent part, "the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest." Minn. Stat. § 181.952(1) subdiv. (5). The DATWA further states that its terms "shall not be construed to limit the parties to a collective bargaining agreement from bargaining or agreeing with respect to a drug and alcohol policy that meets or exceeds and does not conflict with, the minimum standards and requirements for employee protection...." *Id.* § 181.955(1). With regard to professional athletes, the DATWA specifically authorizes random testing "if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement." *Id.* § 181.951(4). The state court granted a temporary restraining order barring Wilson's suspension, prompting the League to remove the case to federal court, where it was consolidated with the MLBPA action seeking vacation of the arbitrator's award under the Labor Management Relations Act ("LMRA").

PROCEDURAL HISTORY

The District Court for the Southern District of Tullahoma held the DATWA claims preempted by § 301 of the LMRA because, by its terms, the DATWA predicates relief on interpretation and application of the CBA. It also upheld the arbitrator's interpretation of the CBA as fully consistent with public policy because the League does not owe its players a fiduciary duty to issue particularized warnings concerning specific products. The Court of Appeals for the Fourteenth Circuit reversed, holding that the DATWA claims were not preempted because they were sufficiently independent of the CBA and vacating the arbitrator's award as contrary to public policy because it condoned the League's alleged breach of fiduciary duty. Petitioner filed a petition for a writ of certiorari, which was subsequently granted by this Honorable Court.

SUMMARY OF THE ARGUMENT

Respondent's claim brought under Minnesota's DATWA is properly preempted by § 301 of the LMRA because the state statute expressly requires interpretation of the terms of applicable collective bargaining agreements. If such claims are not preempted as required by this Court's jurisprudence, the States will be free to proffer varied and conflicting interpretations of collective bargaining agreements pertaining to national bargaining units, undermining the uniform federal labor policy that Congress intends to prevail over inconsistent state regulations. Parties would no longer be certain of their rights and obligations under such agreements, the negotiation of which would become immeasurably more difficult. Employers such as the League would be prevented from effectively regulating the use of prohibited substances in national workforces because they would be compelled to comply with the requirements of all fifty states.

The arbitration award must be upheld because there is no well defined and dominant public policy that requires employers to provide particularized disclosures to their employees. The CBA expressly forecloses the existence of any such fiduciary duty by implementing a policy of strict liability with regard to positive test results. Furthermore, vacating the award would threaten the clear federal policy favoring the private settlement of industrial disputes and needlessly encourage litigation challenging arbitration awards on public policy grounds. The Respondents were free to bargain for less than strict liability but failed to do so; they must be held to their agreements.

ARGUMENT

I. SECTION 301 OF THE LMRA PROPERLY PREEMPTS RESPONDENTS' DATWA CLAIMS BECAUSE THEIR ENFORCEMENT IMPERMISSIBLY THREATENS THE NATIONAL UNIFORMITY ESSENTIAL TO FEDERAL LABOR POLICY AND THE INTEGRITY OF COMPETITION IN PROFESSIONAL SPORTS NATIONWIDE.

Congress's power to preempt state law derives from the Supremacy Clause of Art. VI of the Federal Constitution. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Although congressional power to legislate with respect to labor relations is also well established, Congress has never exercised its authority to occupy the entire field of labor regulation. *Id.* Congressional intent is the "ultimate touchstone" in determining whether a certain state action is preempted by federal law. *Id.* Absent an explicit indication of that intent, courts will sustain a local regulation unless it conflicts with or frustrates a federal scheme or the totality of circumstances suggests that Congress intended to occupy the entire field. *Id.* Although § 301 of the LMRA states that suits for the violation of collective bargaining agreements "may be brought in any district court of the United States," Congress did not say whether and to what extent it intended for that section to preempt state law. 29 U.S.C. § 185(a). This Court subsequently declared that § 301

expresses a federal policy that the substantive law applicable in such cases “is federal law, which the courts must fashion from the policy of our national labor laws.” *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). By enacting § 301, Congress expressed its intention that “paramount” federal doctrines of labor law should prevail uniformly over inconsistent local rules. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

The *Lucas Flour* Court elaborated on the importance of federal supremacy under § 301: “The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.” 369 U.S. at 103-04. State rules that purport to define the meaning or scope of a term in a collective bargaining agreement are therefore preempted. *Id.* Section 301’s preemptive effect must extend beyond suits that allege mere contract violations to include those that pertain to the relationships created by collective bargaining agreements to fully realize its underlying policy of uniformity. *Lueck*, 471 U.S. at 210-11.

Of course, not every dispute concerning employment or “tangentially involving a provision” of a collective bargaining agreement is preempted by § 301, which is wholly neutral as to the substance of collective bargaining agreements. *Id.* Congress did not intend to “give the substantive provisions of private agreements the force of federal law,” for “[s]uch a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.” *Id.* at 212. A state-law claim must therefore exist independently of a collective bargaining agreement to escape preemption; if, however, evaluation of a state-law claim is “inextricably intertwined” with consideration of the terms of a collective bargaining agreement, the state-law claim is preempted. *Id.* at 213. When the meaning of contractual terms is not the subject of the dispute, merely consulting a collective

bargaining agreement during the course of state-law litigation will not require preemption. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). In sum, preemption is required where a state-law claim (1) derives from rights or obligations set forth in a collective bargaining agreement or (2) requires interpretation of a provision therein. *Lueck*, 471 U.S. at 213; *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006); *Gore v. Trans World Airlines*, 210 F.3d 944, 951 (8th Cir. 2000).

A. The Plain Terms of the DATWA Require Courts to Construe Relevant Collective Bargaining Agreements to Determine If They Provide Employee Protections That Meet or Exceed Those of the Act.

Where litigating a state law claim in any way requires the interpretation of a collective bargaining agreement, this Court has mandated preemption. In *Lueck*, a state-law claim sounded in tort for the bad-faith handling of an insurance claim, but the claim in fact arose from a disability insurance plan in a collective bargaining agreement. 471 U.S. at 204. Good faith simply could not be defined without first understanding the mutual intent of the parties, for any alleged breach could take on a different light in view of the contract. *Id.* at 218. “Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation.” *Id.* An analysis of the duties the insurer agreed to assume as claims handler necessarily involved an interpretation of the terms of the collective bargaining agreement. As such, preemption was necessary or “the meaning of the health and disability-benefit provisions of the labor agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted.” *Id.* at 220; *see also Stringer v. NFL*, 474 F. Supp. 2d 894, 910-11 (S.D. Ohio 2007) (state-law claim preempted because its “resolution [was]

inextricably intertwined and substantially dependent upon an analysis of certain CBA provisions”) (internal quotation marks omitted); *Holmes v. NFL*, 939 F. Supp. 517, 527 (N.D. Tex. 1996) (independent state-law claim for invasion of privacy preempted by the NLRA because an analysis of the collective bargaining agreement was required to determine whether the test was authorized).

Just as good faith could not be defined in *Lueck* without first interpreting the agreement between the parties, Minnesota’s DATWA expressly requires courts to examine, interpret, and understand the CBA and, more specifically, the Policy, before litigation can proceed. The statute expressly states that parties may agree to a drug-testing policy so long as that policy “meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection....” Minn. Stat. § 181.955(1). Thus, as a threshold matter, the court must examine the collective bargaining agreement and interpret its terms to determine whether and to what extent it conflicts with the DATWA’s minimum standards. As currently written, litigating claims under the DATWA necessarily involves interpretation of relevant collective bargaining agreements, such that all DATWA claims are preempted as a matter of federal law.

In *Gore*, an airline worker brought multiple state-law tort claims against his employer due to the airline’s handling of a complaint by a colleague who overheard him claiming he planned to kill himself and other employees. 210 F.3d at 948. The court found claims for false arrest, libel, slander, negligence, and invasion of privacy preempted because each count contained elements that could not be satisfied without interpretation of the duties and obligations in the collective bargaining agreement. *Id.* at 949-50. The airline countered that its actions were required by the agreement, as it had an affirmative duty to protect the safety of its employees. *Id.* at 950. State law created the torts in question, but the collective bargaining agreement was the basis of the

duties owed by the defendant. *Id.* Thus, although the employee completely avoided mention of the agreement in his complaint, its indication that the actions at issue “took place in the course and scope” of his employment sufficed to require interpretation of the CBA and therefore preemption as well. *Id.*

Here, Wilson concededly derives his rights not from the collective bargaining agreement, but from the DATWA itself, unlike the plaintiffs in both *Lueck* and *Gore*. Nevertheless, although the DATWA is in that sense independent from the collective bargaining agreement, it remains dependent in “the sense . . . that matters”: resolution of DATWA litigation inherently requires the construction of relevant collective bargaining agreements. *Lingle*, 486 U.S. at 407. Preemption hinges on this overriding fact, for once the courts of a state are free to separately construe collective bargaining agreements, the test for preemption is satisfied. Faced with a DATWA claim, a court must evaluate whether established testing procedures constitute a form of discipline. Minn. Stat. § 181.953(10). Next, as mentioned, it must determine whether and to what extent a collective bargaining agreement is inconsistent with the statutory protections. *Id.* § 181.955(1). The court would also have to interpret the employee’s rights under the agreement to ascertain if they meet or exceed the DATWA’s requirement of an opportunity to “explain the positive test.” *Id.* § 181.953(6). Additionally, the DATWA requires that employees exhaust all grievance procedures included in the CBA before bringing suit. *Id.* § 181.956(1). This requirement makes interpretation of grievance procedures an element of *every* DATWA claim. As the District Court below noted, “[B]ecause DATWA commands courts to analyze and interpret the twenty-seven pages of the Policy so that it [sic] can meaningfully compare them to the numerous requirements in DATWA’s twenty-four separate subdivisions, the DATWA claims

are inextricably intertwined with consideration of the terms of the Policy and are therefore preempted” (internal quotation marks omitted).

The employer in *Superior Waterproofing* also studiously avoided alleging any violation of the collective bargaining agreement, only for its state-law claim to be preempted and dismissed. 450 F.3d at 334. The trustees of a benefits program sued Superior for violation of its fringe benefits obligations under a collective bargaining agreement. *Id.* Superior defended by claiming it relied on fraudulent assurances from the union that conflicted with the written agreement, which required the court to interpret ambiguities in the collective bargaining agreement to verify the existence and extent of any conflict. *Id.* Wary of disturbing the important policies that underpin preemption, the court remarked, “If state tort law could be used to determine the meaning and effect of CBAs to evade compliance with their terms under federal law, the uniform system envisioned by Congress for their interpretation and enforcement would be disrupted.” *Id.*

Here, as in both *Gore* and *Superior Waterproofing*, the instant CBA is essential to understanding the duties and obligations owed by the League to the players and resolving any related ambiguities. The first such ambiguity is whether or not the Policy “meets or exceeds” the minimum protections afforded by the DATWA—a threshold matter that must be determined before litigation can proceed. *Id.* § 181.955(1). Indeed, the DATWA also makes random drug tests illegal and carves out an exception for professional sports leagues provided that the random testing is “consistent with the collective bargaining agreement.” *Id.* § 181.951(4). Thus, the DATWA explicitly requires courts to decide whether random tests are consistent with a collective bargaining agreement. Rather than exempting professional athletes from its provisions, as Louisiana and other states have done, Minnesota instead asks courts to engage in

the very act that merits preemption: interpretation of the collective bargaining agreement. This threatens the uniform federal policy in favor of collective bargaining and the integrity of professional sports leagues.

The Court of Appeals relied on *Lingle* for the proposition that purely factual inquiries do not “turn on the meaning of any provision of a collective bargaining agreement,” asserting that DATWA claims are purely factual questions that can be answered without interpreting any of the terms in the relevant collective bargaining agreement. 486 U.S. at 407. That reliance was misguided. In *Lingle*, the plaintiff filed a claim for retaliatory discharge under an Illinois whistleblower statute and needed to show only “that (1) he was discharged or threatened with discharge and (2) the employer’s motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.” *Id.* Neither showing required the court to resolve the meaning of any term in a collective bargaining agreement. *Id.* Thus, the state-law claim was not preempted and could proceed. *Id.* Here, the DATWA specifically requires the interpretation of terms of collective bargaining agreements wherever they apply, compelling preemption on its face. *Lingle* is inapposite and should not govern the facts at bar.

B. Uniform Federal Law Must Determine the Legal Ramifications That Result from Breaches of Collective Bargaining Agreements.

“Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in . . . a suit for breach of contract or . . . liability in tort.” *Rawson v. United Steelworkers of Am.*, 495 U.S. 362, 369 (1990); *Lueck*, 471 U.S. at 211. Parties cannot escape their obligations under collective bargaining agreements by characterizing them in terms of otherwise independent state-law torts or other causes of

action. Indeed, even mentioning an employer's failure to abide by the terms of a collective bargaining agreement in pleadings has been held sufficient to require interpretation and therefore preemption as well. *Thompson v. Hibbing*, No. 08-868, 2008 U.S. Dist. LEXIS 87045, at *12 (D. Minn. Oct. 24, 2008).

In *Rawson*, state-law claims of negligence were preempted by the LMRA even though they arose independently from the collective bargaining agreement. 495 U.S. at 372. Following a mining accident, the United Steelworkers brought suit alleging violations of a common-law duty to inspect the mine with due care, but specifically referenced the collective bargaining agreement in their complaint. *Id.* at 365. The Court held that although the common-law duty to inspect arose from the fact that the employer conducted the inspection, the employer's duty nevertheless originated in the inspection clauses of the collective bargaining agreement and could only be defined by interpreting those provisions. *Id.* at 371. Hence, although the state-law claim was factually independent to some extent, it *still* required the court to construe the terms of the agreement. *Id.* The Court observed, "Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law," before concluding that the state-law claim was not sufficiently independent to avoid preemption. *Id.*

Similarly, in *Thompson*, the plaintiff failed a drug test required by his collective bargaining agreement. He brought suit alleging both that the drug testing policy in the collective bargaining agreement violated the DATWA and that the employer breached the contract by failing to follow the terms of the policy. 2008 U.S. Dist. LEXIS 87045, at *7-*8. The district court reasoned that because the first count of the complaint alleged that the employer violated its own policy under the collective bargaining agreement, "questions concerning the permissible parameters of its drug testing policy . . . remain dependent on the parameters set by the CBA."

Id. at *12-*13. By invoking the collective bargaining agreement in the complaint, evaluation of the state-law claim was “inextricably interwoven with the terms of the CBA and [was] completely preempted by the LMRA.” *Id.* at *13. Furthermore, even where the complaint artfully avoids any mention of the collective bargaining agreement, if the plain language of a state statute requires a court to examine the agreement to “determine whether the agreement . . . resulted in conditions that are more favorable to the employees,” the claim is inextricably intertwined and consequently preempted. *Zupancich v. United States Steel Corp.*, No. 08-5847, 2009 U.S. Dist. LEXIS 44504, at *9 (D. Minn. May 27, 2009).

As the Fourteenth Circuit remarked below, Respondent Wilson initially filed suit in Minnesota District Court alleging “numerous violations of Minnesota common law and breach of contract,” before later amending it to include a claim under the DATWA. Even then, the allegations were nonspecific as to how the Policy violated the DATWA beyond a failure to use certified laboratories. In a footnote, the Court of Appeals emphasized that “[t]he amended complaint does not flesh out the claim but generally states that ‘the defendants have violated the Player’s substantive and procedural rights under the [DATWA].’” Just as in *Rawson, Thompson*, and *Zupancich*, the plaintiff, as master of his claim, has opted to allege breach of contract, which by definition calls upon the court to interpret the terms of the collective bargaining agreement. Even had Respondent omitted any mention of the collective bargaining agreement, the DATWA itself still requires courts to evaluate whether the Policy “resulted . . . in conditions that are more favorable to the employees,” as in *Zupancich*. Moreover, because Respondents failed to allege any specific violations of the DATWA, courts are further obligated to examine and compare the whole of the Policy against the whole of the statute to determine whether they conflict. This wrongfully requires courts to interpret the terms and conditions of the agreement, mandating

preemption as a matter of federal law. Any litigation under the DATWA would thus impermissibly address the legal consequences that the parties intended to flow from breaches of the agreement without resort to federal law.

C. **The Numerous and Varied Interpretations Required by the DATWA Will Frustrate the National Uniformity Essential to Federal Labor Policy, Exacerbate an Already Uneven Playing Field, and Endanger the Integrity of Our National Pastime.**

The possibility that States could interpret like terms differently in collective bargaining agreements has prompted this Court to repeatedly emphasize the primacy of federal labor policy in the realm of labor regulation. *Lingle*, 486 U.S. at 404; *Lueck*, 471 U.S. at 211; *Lucas Flour*, 369 U.S. at 103. The Court immediately recognized the threat inherent in such varied interpretation, anticipating that “[b]ecause neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions . . . to contain the same meaning under two or more systems of law” *Lucas Flour*, 369 U.S. at 103. If state law is permitted to decide the meaning intended by parties, “it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate,” stultifying the congressional policy of administering collective bargaining agreements under uniform federal law. *Lueck*, 471 U.S. at 211. There can be little doubt that Congress intended for uniform doctrines of federal labor law to prevail over inconsistent state regulation, as “the application of state law . . . might lead to inconsistent results since there could be as many state-law principles as there are States.” *Lingle*, 486 U.S. at 406.

Even outside the field of labor law, the Court has emphasized the importance of uniform national economic policy and the threat posed by state regulations that tend to affect behavior in other states. In *Healy v. Beer Institute, Inc.*, the Court held that a Connecticut beer-price

affirmation statute violated the Commerce Clause by effectively regulating the price of alcohol in surrounding states. 491 U.S. 324, 336 (1989). The Court began by noting the “Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of individual States within their respective spheres.” *Id.* at 335-36. Fundamentally, the Commerce Clause prohibits the application of state statutes to commerce that occurs outside of a State’s borders. *Id.* at 336. More specifically, “[a] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Id.* The “critical inquiry” under the Commerce Clause is “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Id.*

These concerns over national uniformity take on special importance in the context of our major professional sporting leagues. In *Partee v. San Diego Chargers Football Co.*, the California Supreme Court highlighted the importance of such national cohesion:

Professional football is a nationwide business structured essentially the same as baseball. Professional football’s teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.

668 P.2d 674, 678 (Cali. 1983). In particular, our national pastime has struggled mightily to implement meaningful regulation of performance-enhancing substances, such as those prohibited League-wide by the Policy. The scandals surrounding Mark McGuire, Barry Bonds, and the Homerun Record are all too familiar, as are the ensuing scenes that unfolded in congressional

hearings. Only in 2007 did the League finally obtain the necessary prohibitions during the course of bargaining with the MLBPA. Now, in an effort to shirk their obligations under that agreement and frustrate the League's efforts to regulate widely condemned substances, Respondents are exploiting the DATWA to fragment and frustrate federal labor policy. *Anderson v. Ford Motor Co.*, 803 F.2d 953, 955 (8th Cir. 1986) ("Where federal and state law conflict in the area of labor relations, or where local regulation would frustrate the federal labor law scheme, federal law preempts state law"). Through their efforts, the League may have to abandon any hope at effectively prohibiting the use of banned substances simply because strict liability provisions are illegal in one State. Performance enhancing substances are poisonous not only to the players who use them, but also to the children who idolize such players, to the public's perception of professional sports, and to fair competition. Every time a professional sports team from Minnesota takes the field, fans throughout the country will wonder if it has gained an unfair advantage.

Similarly, future efforts to negotiate collective bargaining agreements in baseball and other national bargaining units will be immensely complicated by the need to accommodate the laws of each and every state, regardless of where the parties are situated. Parties will have room to negotiate only between the highest floor and lowest ceiling from among the fifty states. *See Lucas Flour*, 369 U.S. at 104 (Section 301 prevents states from intruding into "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining" which "is the keystone of the federal scheme to promote industrial peace"). Even then, future attempts to clarify the meaning of such agreements would be stifled by the numerous and varied interpretations proffered by individual states, muddying the mutual understanding of parties to collective bargaining agreements and needlessly creating additional litigation. As one

commentator notes, “Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity. The existence of two bodies of law which cannot be accommodated by any conflict-of-laws rule, however, is calculated to aggravate rather than to alleviate the situation.” *Lucas Flour*, 369 U.S. at 104 (quoting Wellington, Harry H., *Labor and the Federal System*, 26 U. of Chi.L.Rev. 542, 557 (1959)). Just as the *Lucas Flour* Court feared, parties would not be certain of their rights and duties, negotiations would grind to a halt, and the congressional policy favoring uniform federal labor law would be subverted.

It is equally clear that allowing state interpretation of contractual terms as required by the DATWA would frustrate efforts at national regulation. Under *Healy*, the “critical inquiry” for Commerce Clause purposes is whether a state law has the practical effect of controlling conduct in another state. 491 U.S. at 336. Here, it is uncontested that the DATWA has the effect of regulating the application of the CBA not just in Minnesota, but in four other states as well. The Petitioner is under a good faith duty to administer the Policy fairly to all players. If the Commissioner is unable to enforce discipline against one player due to a claim brought under the DATWA, he is precluded from disciplining any player. Indeed, a player could take substances considered far worse than energy-boosting supplements and still be vindicated under the DATWA because the Policy imposes strict liability. The Commissioner would then be unable to regulate any substance of any kind, simply because a single state’s legislature deemed it necessary to interpret applicable collective bargaining agreements in order to provide minimal workplace protections. This would only serve to further undermine the integrity of professional sports and upset the uniform federal scheme of labor regulation.

II. THE ARBITRATOR'S AWARD MUST BE UPHELD BECAUSE NO FIDUCIARY DUTY EXISTS AND FEDERAL LABOR POLICY STRONGLY FAVORS RESOLVING DISPUTES BY ARBITRATION.

The federal statutes that regulate labor-management relations “reflect a decided preference for private settlement of labor disputes without the intervention of the government.”

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37 (1987). The LMRA provides that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.” 29 U.S.C. § 173(d). Judicial review of an arbitrator’s award is “exceptionally narrow.” *Coca-Cola Bottling Co. of St. Louis v. Teamsters*, 959 F.2d 1438, 1440 (8th Cir. 1992). So long as the award “draws its essence” from the collective bargaining agreement and is not merely the arbitrator’s “own brand of industrial justice,” it is legitimate. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Courts must confirm the award if “the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Misco*, 484 U.S. at 38. The Federal Arbitration Act allows a court to set aside an arbitration award only if that award “was procured by fraud, corruption, or undue means,” or when “there was evident partiality in the arbitrators.” 9 U.S.C. §§ 10(a)(1)-(2). Rarely, if the contract as interpreted by the arbitrator violates a public policy that is “well defined and dominant, and . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests,” courts must refrain from enforcing the award. *See E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983); *Muschany v. United States*, 324 U.S. 49, 66 (1945).

A. **The League Owes No Well Defined and Dominant Fiduciary Duty to the Players to Give Particularized Warnings and Therefore Upholding the Award Does Not Violate Public Policy.**

This Court noted the rarity of invalidating a contract on public policy grounds in *Muschany*, concluding, “In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts . . . contrary to public policy.” 324 U.S. at 66-67. Illustrating the heavy burden shouldered by those invoking the public policy exception, the *W.R. Grace* Court upheld an arbitration award even where the award penalized the employer for conduct that was undertaken per the terms of an order from the Equal Employment Opportunity Commission because that conduct nevertheless violated the terms of the relevant collective bargaining agreement. 461 U.S. at 772. Even though it was “beyond question that obedience to judicial orders is an important public policy,” enforcement of the agreement as interpreted would not compromise that policy because future employers would be no more likely to disobey court orders. *Id.* at 766-67. The company boxed itself in by agreeing to a collective bargaining agreement inconsistent with the order. *Id.* at 767. That it violated the agreement by complying with the order was the natural consequence of undertaking two contradictory endeavors. *Id.*

Similarly, in *Misco*, this Court reversed the vacation of an award on public policy grounds because the Court of Appeals failed to ascertain a public policy against reinstating an employee that possessed marijuana by reference to the law and not from general considerations of supposed public interests. 484 U.S. at 44. The lower court “made no attempt” to reviewing existing precedent to show a well defined and dominant policy against the operation of heavy equipment while under the influence of drugs. *Id.* Even accepting the existence of such a

public policy, the court found no violation because “the assumed connection between the marijuana gleanings found in Cooper’s car and Cooper’s actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy” *Id.* Further, the Court of Appeals had no right to question the merits of the arbitrator’s award so long as it drew its essence from the agreement, regardless of whether it disagreed with the arbitrator’s disposition. *Id.* “A refusal to enforce an award must rest on more than speculation or assumption.” *Id.* The Court tracked this reasoning in *Eastern Associated Coal* when it held that an arbitrator’s award ordering the employer to reinstate a truck driver who had twice tested positive for marijuana could be enforced without violating public policy. 531 U.S. at 65. The Omnibus Transportation Employee Testing Act did not contain a sufficiently definite policy against reinstating employees that fail a random drug test once or twice. *Id.*

This case closely resembles *W.R. Grace, Misco*, and *Eastern Associated Coal*, in that there is no sufficiently well defined and dominant public policy from the laws and legal precedents of New York, which governs the collective bargaining agreement between Petitioner and Respondents. Respondents’ claim that the award condones violations of a public policy favoring particularized disclosures is no less speculative than the public policy asserted in both *Misco* and *Eastern Associated Coal*. Indeed, the express terms of the collective bargaining agreement explicitly reject the existence of such a duty to disclose. Repeatedly, players are reminded that they *and they alone* are responsible for what is in their bodies. The memorandum discussing the Hotline also disclaims any responsibility for what is in players’ bodies. See *Walton-Floyd v. United States Olympic Comm.*, 965 S.W.2d 35 (Tex. Ct. App. 1998) (finding that the USOC did *not* voluntarily assume a duty under state law through the operation of a

hotline service available to athletes to check the status of all medications as to the list of prohibited substances). Moreover, each player agreed to be strictly liable under the Policy for positive tests. All parties further agreed to be bound by arbitration, which constitutes “the full, final, and complete disposition of the appeal.” In spite of all of this, the Respondents disingenuously continue to maintain that it is the Petitioner that failed to discharge its obligations under the Policy, when it is the Respondents who do not wish to abide by the plain language of the Policy and now cannot accept the results of agreed-upon arbitration.

In no way are these facts analogous to those of *Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers*, where the Eighth Circuit vacated an award as violative of a clear and dominant public policy against reinstating a nuclear power plant employee who deliberately violated federal safety regulations. 834 F.2d 1424, 1428 (1987). After reviewing a plethora of regulations that explicitly prohibited the conduct in question, the Court remarked, “Nothing could be plainer than the public interest in the safe operation of nuclear power plants that underlies this panoply of federal regulations.” *Id.* Respondents are unable to identify a similarly well defined and dominant public policy requiring particularized disclosures under these facts. Although Respondents might contend that a fiduciary relationship “may be found in any case in which . . . confidence has been reposed and betrayed,” *United Feature Syndicate Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002), it strains credulity to suggest that by agreeing to strict liability for all positive tests the players somehow reposed confidence in the League or its agents. It is impossible to discern a fiduciary duty owed by the League to its players that was not extinguished by the express terms of the collective bargaining agreement. *See Gore*, 210 F.3d at 950 (holding that the collective bargaining agreement was the “defining source of the

duties specifically owed by the defendants for each claim asserted”). Because the agreement does not violate a well defined and dominant public policy requiring employers to give particularized warnings, this Court must uphold the award suspending the players who tested positive.

B. Uniform Federal Labor Policy Strongly Favors the Resolution of Industrial Disputes by Arbitration.

“Federal labor law is noteworthy for its strong public policy in favor of the private resolution of labor disputes without resort to the courts.” *Coca-Cola*, 959 F.2d at 1440; *see also Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004). Overturning an arbitrator’s award based upon public policy considerations is the rarest form of court interference: “An arbitrator’s result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference.” *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 670 (11th Cir. 1988). A federal court may not vacate an award simply because it believes its own interpretation of the contract is superior. *W.R. Grace*, 461 U.S. at 764. “When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator.” *Id.* Parties bargain for arbitration, are free to bargain for an alternate means of dispute resolution, and must resign themselves to the arbitrator’s result absent a violation of well defined and dominant public policy. “[I]t is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.” *Misco*, 484 U.S. at 37-38. If courts were free to reconsider the merits of an arbitrator’s decision, “the speedy resolution of grievances by private mechanisms would be greatly undermined.” *Id.* at 38.

Just as in *Misco*, here the Respondents allege no dishonesty or other malfeasance on the part of the arbitrator. Indeed, the arbitrator could not have decided the matter any other way in

light of the terms of the collective bargaining agreement. Any decision that relieved the players of their strict liability for positive test results would fail to draw its essence from the policy; the arbitrator was constrained to uphold the suspensions. As the District Court of Tullahoma astutely noted, the Respondents were free to bargain for a clause that would obviate strict liability by requiring the Petitioner to issue particularized warnings about specific products, but they failed to do so. Although a court might disagree with the decision or its rationale, it is not free to substitute its view that full disclosure is preferable. So long as the arbitrator's decision is reasonable, her "interpretation . . . is entitled to the greatest deference in all American jurisprudence." *Coca-Cola*, 959 F.2d at 1443. The parties here undeniably bargained for an arbitration provision and must now be held to their agreement. To vacate the award would jeopardize the utility of arbitration not just for the League and its employees, but for all parties to collective bargaining agreements. It would also needlessly encourage vexatious litigation—precisely the result the federal policy favoring arbitration was implemented to avoid.

Finally, vacating the award would effectively negate League efforts at regulating performance-enhancing substances. If an award can be vacated despite closely tracking the agreement because of implied duties of disclosure not found in the agreement, the onus will pass from the players to the League to protect the integrity of our national pastime. Then only if the League properly identifies and warns its players about each supplement will it be able to enforce its policy. Players will be free to take supplements not at their own risk, but at the League's, which will be obligated to test literally every supplement to fulfill its duty. When players do test positive, they will face no accountability unless they were specifically warned about the supplement they ingested. Clearly, professional athletes who make millions off their physical prowess are capable of monitoring what substances they choose to take. It is equally clear that

the party best able to manage this kind of liability is the player, who can simply avoid taking energy-boosting supplements altogether, as the League and the MLBPA consistently urge players to do. Yet vacating the award would effectively shift that responsibility to the League and jeopardize the integrity of baseball in this country. The other professional sports would likely follow suit, endangering the level playing field all agree is essential to sports.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Fourteenth Circuit as to both issues, holding that Respondents' DATWA claims are properly preempted by § 301 of the LMRA and upholding the arbitrator's award suspending the players who tested positive.

/s/ Team 29

COUNSEL FOR PETITIONER
Major League Baseball

APPENDIX A

28 U.S.C. § 1254.

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX B

The Minnesota Drug and Alcohol Testing in the Workplace Act

Minn. Stat. §§ 181.950 - .957 (2009)

181.950 DEFINITIONS.

Subdivision 1. Applicability.

For the purposes of sections 181.950 to 181.957, the terms and phrases defined in this section have the meanings given them.

Subd. 2. Confirmatory test; confirmatory retest.

"Confirmatory test" and "confirmatory retest" mean a drug or alcohol test that uses a method of analysis allowed under one of the programs listed in section 181.953, subdivision 1.

Subd. 3.

[Repealed, 1991 c 60 s 12]

Subd. 4. Drug.

"Drug" means a controlled substance as defined in section 152.01, subdivision 4.

Subd. 5. Drug and alcohol testing.

"Drug and alcohol testing," "drug or alcohol testing," and "drug or alcohol test" mean analysis of a body component sample according to the standards established under one of the programs listed in section 181.953, subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.

Subd. 6. Employee.

"Employee" means a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer.

Subd. 7. Employer.

"Employer" means a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state.

Subd. 8. Initial screening test.

"Initial screening test" means a drug or alcohol test which uses a method of analysis under one of the programs listed in section 181.953, subdivision 1.

Subd. 9. Job applicant.

"Job applicant" means a person, independent contractor, or person working for an independent contractor who applies to become an employee of an employer, and includes a person who has received a job offer made contingent on the person passing drug or alcohol testing.

Subd. 10. Positive test result.

"Positive test result" means a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above the threshold detection levels contained in the standards of one of the programs listed in section 181.953, subdivision 1.

Subd. 11. Random selection basis.

"Random selection basis" means a mechanism for selection of employees that (1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected and (2) does not give an employer discretion to waive the selection of any employee selected under the mechanism.

Subd. 12. Reasonable suspicion.

"Reasonable suspicion" means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

Subd. 13. Safety-sensitive position.

"Safety-sensitive position" means a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.

History:

1987 c 388 s 1; 1991 c 60 s 1-4

181.951 AUTHORIZED DRUG AND ALCOHOL TESTING.

Subdivision 1. Limitations on testing.

(a) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section.

(b) An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1.

(c) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing on an arbitrary and capricious basis.

Subd. 2. Job applicant testing.

An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, as provided in section 181.953, subdivision 11, the employer shall inform the job applicant of the reason for its action.

Subd. 3. Routine physical examination testing.

An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

Subd. 4. Random testing.

An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement.

Subd. 5. Reasonable suspicion testing.

An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

(1) is under the influence of drugs or alcohol;

(2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;

(3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

Subd. 6. Treatment program testing.

An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

Subd. 7. No legal duty to test.

Employers do not have a legal duty to request or require an employee or job applicant to undergo drug or alcohol testing as authorized in this section.

History:

1987 c 388 s 2; 1988 c 536 s 1; 1991 c 60 s 5; 2005 c 133 s 1

181.952 POLICY CONTENTS; PRIOR WRITTEN NOTICE.

Subdivision 1. Contents of the policy.

An employer's drug and alcohol testing policy must, at a minimum, set forth the following information:

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or alcohol testing may be requested or required;
- (3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
- (4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
- (5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
- (6) any other appeal procedures available.

Subd. 2. Notice.

An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy, to a previously nonaffected employee upon transfer to an affected position under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. An employer shall also post notice in an appropriate and conspicuous location on the employer's premises that the employer has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by its employees or job applicants in the employer's personnel office or other suitable locations.

History:

1987 c 388 s 3

181.953 RELIABILITY AND FAIRNESS SAFEGUARDS.

Subdivision 1. Use of licensed, accredited, or certified laboratory required.

(a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing:

(1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;

(2) is accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program;
or

(3) is licensed to test for drugs by the state of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

(b) For alcohol testing, the laboratory must either be:

(1) licensed to test for drugs and alcohol by the state of New York, Department of Health, under Public Health Law, article 5, title V, and the rules adopted under that law;
or

(2) accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, in the laboratory accreditation program.

Subd. 2.

[Repealed, 1991 c 60 s 12]

Subd. 3. Laboratory testing, reporting, and sample retention requirements.

A testing laboratory that is not certified by the National Institute on Drug Abuse according to subdivision 1 shall follow the chain-of-custody procedures prescribed for employers in subdivision 5. A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test. A laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test. A test report must indicate the drugs, alcohol, or drug or alcohol metabolites tested for and whether the test produced negative or positive test results. A laboratory shall retain and properly store for at least six months all samples that produced a positive test result.

Subd. 4. Prohibitions on employers.

An employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer; except that, one agency of the state may test the employees of another agency of the state. Except as provided in subdivision 9, an employer may not request or require an employee or job applicant to contribute to, or pay the cost of, drug or alcohol testing under sections 181.950 to 181.954.

Subd. 5. Employer chain-of-custody procedures.

An employer shall establish its own reliable chain-of-custody procedures to ensure proper record keeping, handling, labeling, and identification of the samples to be tested. The procedures must require the following:

- (1) possession of a sample must be traceable to the employee from whom the sample is collected, from the time the sample is collected through the time the sample is delivered to the laboratory;
- (2) the sample must always be in the possession of, must always be in view of, or must be placed in a secured area by a person authorized to handle the sample;
- (3) a sample must be accompanied by a written chain-of-custody record; and
- (4) individuals relinquishing or accepting possession of the sample must record the time the possession of the sample was transferred and must sign and date the chain-of-custody record at the time of transfer.

Subd. 6. Rights of employees and job applicants.

(a) Before requesting an employee or job applicant to undergo drug or alcohol testing, an employer shall provide the employee or job applicant with a form, developed by the

employer, on which to acknowledge that the employee or job applicant has seen the employer's drug and alcohol testing policy.

(b) 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.

(c) Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit information to the employer, in addition to any information already submitted under paragraph (b), to explain that result, or may request a confirmatory retest of the original sample at the employee's or job applicant's own expense as provided under subdivision 9.

Subd. 7. Notice of test results.

Within three working days after receipt of a test result report from the testing laboratory, an employer shall inform in writing an employee or job applicant who has undergone drug or alcohol testing of (1) a negative test result on an initial screening test or of a negative or positive test result on a confirmatory test and (2) the right provided in subdivision 8. In the case of a positive test result on a confirmatory test, the employer shall also, at the time of this notice, inform the employee or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and either subdivision 10 or 11, whichever applies.

Subd. 8. Right to test result report.

An employee or job applicant has the right to request and receive from the employer a copy of the test result report on any drug or alcohol test.

Subd. 9. Confirmatory retests.

An employee or job applicant may request a confirmatory retest of the original sample at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test. Within five working days after notice of the confirmatory test result, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest. Within three working days after receipt of the notice, the employer shall notify the original testing laboratory that the employee or job applicant has requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed under subdivision 1 to conduct the confirmatory retest. The original testing laboratory shall ensure that the chain-of-custody procedures in subdivision 3 are followed during transfer of the sample to the other laboratory. The confirmatory retest must use the same drug or alcohol threshold detection levels as used in the original confirmatory test. If the confirmatory retest does

not confirm the original positive test result, no adverse personnel action based on the original confirmatory test may be taken against the employee or job applicant.

Subd. 10. Limitations on employee discharge, discipline, or discrimination.

(a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an 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 following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and

(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, coemployees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.

(d) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of medical history information revealed to the employer pursuant to subdivision 6 unless the employee was under an affirmative duty to provide the information before, upon, or after hire.

(e) An employee must be given access to information in the employee's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process and conclusions drawn from and actions taken based on the reports or other acquired information.

Subd. 11. Limitation on withdrawal of job offer.

If a job applicant has received a job offer made contingent on the applicant passing drug and alcohol testing, the employer may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

History:

1987 c 384 art 3 s 32; 1987 c 388 s 4; 1988 c 536 s 2,3; 1991 c 60 s 6-9; 1997 c 180 s 2; 2004 c 228 art 1 s 32

181.954 PRIVACY, CONFIDENTIALITY, AND PRIVILEGE SAFEGUARDS.

Subdivision 1. Privacy limitations.

A laboratory may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested.

Subd. 2. Confidentiality limitations.

Test result reports and other information acquired in the drug or alcohol testing process are, with respect to private sector employees and job applicants, private and confidential information, and, with respect to public sector employees and job applicants, private data on individuals as that phrase is defined in chapter 13, and may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested.

Subd. 3. Exceptions to privacy and confidentiality disclosure limitations.

Notwithstanding subdivisions 1 and 2, evidence of a positive test result on a confirmatory test may be: (1) used in an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under chapter 43A or other applicable state or local law, or a judicial proceeding, provided that information is relevant to the hearing or proceeding; (2) disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract; and (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee.

Subd. 4. Privilege.

Positive test results from an employer drug or alcohol testing program may not be used as evidence in a criminal action against the employee or job applicant tested.

History:

181.955 CONSTRUCTION.

Subdivision 1. Freedom to collectively bargain.

Sections 181.950 to 181.954 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.

Subd. 2. Employee protections under existing collective bargaining agreements.

Sections 181.950 to 181.954 shall not be construed to interfere with or diminish any employee protections relating to drug and alcohol testing already provided under collective bargaining agreements in effect on the effective date of those sections that exceed the minimum standards and requirements for employee protection provided in those sections.

History:

1987 c 388 s 6

181.956 REMEDIES.

Subdivision 1. Exhaustion.

An employee or collective bargaining agent may bring an action under this section only after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement; provided that, an employee's right to bring an action under this section is not affected by a decision of a collective bargaining agent not to pursue a grievance.

Subd. 2. Damages.

In addition to any other remedies provided by law, an employer or laboratory that violates sections 181.950 to 181.954 is liable to an employee or job applicant injured by the violation in a civil action for any damages allowable at law. If a violation is found and damages awarded, the court may also award reasonable attorney fees for a cause of action based on a violation of sections 181.950 to 181.954 if the court finds that the employer knowingly or recklessly violated sections 181.950 to 181.954.

Subd. 3. Injunctive relief.

An employee or job applicant, a state, county, or city attorney, or a collective bargaining agent who fairly and adequately represents the interests of the protected class has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954.

Subd. 4. Other equitable relief.

Upon finding a violation of sections 181.950 to 181.954, or as part of injunctive relief granted under subdivision 3, a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee or job applicant reinstated with back pay.

Subd. 5. Retaliation prohibited.

An employer may not retaliate against an employee for asserting rights and remedies provided in sections 181.950 to 181.954.

History:

1987 c 388 s 7

181.957 FEDERAL PREEMPTION.

Subdivision 1. Excluded employees and job applicants.

Except as provided under subdivision 2, the employee and job applicant protections provided under sections 181.950 to 181.956 do not apply to employees and job applicants where the specific work performed requires those employees and job applicants to be subject to drug and alcohol testing pursuant to:

(1) federal regulations that specifically preempt state regulation of drug and alcohol testing with respect to those employees and job applicants;

(2) federal regulations or requirements necessary to operate federally regulated facilities;

(3) federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or

(4) state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.

Subd. 2.Exclusion limited.

Employers and testing laboratories must comply with the employee and job applicant protections provided under sections 181.950 to 181.956, with respect to employees or job applicants otherwise excluded under subdivision 1 from those protections, to the extent that the provisions of sections 181.950 to 181.956 are not inconsistent with or specifically preempted by the federal regulations, contract, or requirements applicable to drug and alcohol testing.

History:

1987 c 388 s 8

APPENDIX C

The Federal Arbitration Act
9 U.S.C. § 10 (2006)

Section 10. Same; vacation; grounds; rehearing

- a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
 1. Where the award was procured by corruption, fraud, or undue means.
 2. Where there was evident partiality or corruption in the arbitrators, or either of them.
 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
 5. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
- b. The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.