

Federal Constraints Upon Public Entity Employee Drug Testing Policies

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Issues To Be Addressed

1. Parameters for lawful testing of public employees for drugs (alcohol or controlled substances).
2. When is it lawful to administer post-offer drug tests to job applicants?
3. What is a “safety sensitive” or “mandatory-testing” position?
4. When is it lawful to conduct post-accident drug testing of employees?

Public vs. Private Employer

Different standards for public versus private employer with regard to drug testing of employees.

- Private employer still has broad discretion to test both employees and job applicants randomly, without suspicion, and as it sees fit to operate the business.
- Drug testing by public employer is constrained by Fourth Amendment to U.S. Constitution.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment (con't)

- Fourth Amendment only allows the government to engage in “reasonable” searches of citizens.
- Unreasonable searches violate the privacy rights of citizens and hence are prohibited by the Fourth Amendment.
- In most cases, a search is deemed reasonable only when it is accomplished pursuant to a judicial warrant, issued upon probable cause.

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

Fourth Amendment (con't)

- Government mandated drug testing (of any kind) is a “search” within the meaning of the Fourth Amendment.
Schmerber v. California, 384 U.S. 757 (1966);
Lebron v. Secretary, Florida Dept. of Children and Families, 710 F.3d 1202 (11th Cir. 2013)
- It is well established that drug testing which utilizes urinalysis is a “search” that falls within the scope of Fourth Amendment.
Skinner v. Ry. Labor Execs. Ass’n, 489 U.S. 602 (1989)

Fourth Amendment (con't)

- The courts have recognized that the probable cause standard is “... unsuited to determining the reasonableness of administrative searches ...” by the government.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)

- Therefore, in order to be deemed reasonable under the Fourth Amendment in the context of governmental drug testing of its employees, a search must ordinarily be based upon “individualized suspicion of wrong-doing.”

Vernonia School District v. Acton, 515 U.S. 646 (1995)
Chandler v. Miller, 520 U.S. 305 (1997)

Fourth Amendment (con't)

- The Supreme Court has also upheld as “reasonable” searches conducted without individualized suspicion in certain very limited and exceptional circumstances.

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

Chandler v. Miller, 520 U.S. 305 (1997)

New Jersey v. T.L.O., 469 U.S. 325 (1985)

- Government has the burden of showing that there are “special needs” which are “substantial,” which warrant dispensing with the requirement for individualized suspicion.

Fourth Amendment (con't)

- The Supreme Court has found standard employment drug and alcohol testing regimen to be “relatively noninvasive.”
Chandler v. Miller, 520 U.S. 305 (1997)
- If government can demonstrate that there is
 - (a) “special need; or
 - (b) “important governmental interest,”

which is furthered by the minimal intrusion, then it will not be required to show “individualized suspicion” in order to justify testing.

Fourth Amendment (con't)

To date, in the context of employee drug testing, the Supreme Court has recognized only two concerns that present such “exceptional circumstances” which are sufficiently “substantial” to warrant an exemption to the Fourth Amendment’s warrant and probable cause requirement:

- (a) the specific risk to public safety by employees engaged in inherently dangerous jobs, i.e., safety sensitive;
- (b) protection of children entrusted to the public school system’s care and tutelage.

Chandler v. Miller, 520 U.S. 305 (1997)

Fourth Amendment (con't)

Discussion of these general principles with respect to the following categories of testing:

- (a) Reasonable suspicion;
- (b) Random testing of true “safety-sensitive” employees;
- (c) Post-accident.

Reasonable Suspicion Testing

If you have a “reasonable, articulable suspicion” that employee is impaired by or under the influence of drugs/alcohol on job, you can test employee, regardless of his/her position.

This requires individualized suspicion, specifically directed to the person who is targeted for the test.

McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987)

Reasonable Suspicion Testing

(cont'd)

Recurring Issues:

- (1) Does employer truly have a “reasonable suspicion” or is it just a guess/hunch or pretext for random testing?
- (2) Does employer’s supervisor have requisite facts, experience or training to form a reasonable suspicion?
- (3) Can employer’s supervisor articulate a clear basis for that suspicion?
- (4) Has employer applied reasonable suspicion testing in a consistent manner?

Reasonable Suspicion Testing

(cont'd)

Criteria which the courts have found constitutional in order to justify testing include the following:

- Direct observation of drug use or possession.
- Direct observation of the physical symptoms of being under the influence of a drug.
- A pattern of abnormal conduct or erratic behavior by employee.
- Arrest or conviction for a drug related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or distribution.

Reasonable Suspicion Testing

(cont'd)

- Information that is provided by reliable and credible sources or that can be independently corroborated.
- Newly discovered evidence that the employee tampered with a previous drug test.
- Admission by employee

Post-Offer Drug Testing of Job Applicants

Voss v. City of Key West, 24 F. Supp. 3d 1219 (S.D. Fla. 2014)

Facts: City of Key West had policy which required (1) post-offer testing for all job applicants; (2) reasonable suspicion testing; (3) random testing for safety-sensitive employees.

Plaintiff submitted application for position as Solid Waste Coordinator. Signed form agreeing to take drug test and acknowledging that refusal to take or failure to test would disqualify her from consideration.

Post-Offer Drug Testing of Job Applicants

(cont'd)

Plaintiff received conditional offer of the position and then refused to take the test. Position was offered to the next candidate in line. Plaintiff sued for violation of her civil rights – denial of employment due to unconstitutional drug testing policy.

City proffered two alternative “important governmental interests” to justify the testing:

- (1) City had interest in the safe, effective and efficient delivery of public services;
- (2) Coordinator position was “safety-sensitive.”

Court held:

- (a) that City’s interest in safe and effective delivery of services was “symbolic” only – no specific danger identified.

Post-Offer Drug Testing of Job Applicants

(cont'd)

- (b) position of Coordinator was not “safety-sensitive.”
- (c) no legal basis to distinguish between a job applicant and an existing employee with respect to Fourth Amendment protection.

Conclusion:

Only lawful for public employer to conduct post-offer drug tests on applicants for “safety-sensitive” positions.

Impact Upon DFWA:

Note: § 440.102(1)(j) defines the term “job applicant” for a public employer as “...a person who has applied for a special-risk or mandatory-testing position.”

Random or Routine Testing of Safety Sensitive Employees

Supreme Court has approved suspicion-less drug tests of employees in certain “safety sensitive” positions.

- Rationale is that there are “surpassing safety interests” which justify or mandate random testing program for certain classes of employees;
- Employee could cause great injury or damage before any signs of impairment become noticeable to supervisors.
- Courts balance the individual’s privacy expectations against the Government’s interests.”

Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)

Definition: Safety-Sensitive Position

“Mandatory-testing position” means, with respect to a public employer, a job assignment that requires:

- the employee to carry a firearm,
- work closely with an employee who carries a firearm,
- perform life-threatening procedures,
- work with heavy or dangerous machinery,
- work as a safety inspector,
- work with children,
- work with detainees in the correctional system,
- work with confidential information or documents pertaining to criminal investigations,
- work with controlled substances, or
- a job assignment that requires an employee security background check, pursuant to s. 110.1127, or
- **a job assignment in which a momentary lapse in attention could result in injury or death to another person.**

§440.102(1)(o), *Florida Statutes*

Definition: Safety-Sensitive Position? (cont'd)

§440.102(1)(o), *Florida Statutes*

Supplemented by definition of “Special-risk position:”

“Special-risk position” means, with respect to a public employer, a position that is required to be filled by a person who is certified under Chapter 633 or Chapter 943.

§440.102(1)(p), *Florida Statutes*

- Chapter 633-Firefighters/Fire Marshall
- Chapter 943-Law enforcement

Definition: Safety-Sensitive Position (cont'd)

- Various cases have recognized the following as “safety sensitive”: law enforcement; firefighters; EMTs; medical providers; operators of large vehicles and heavy equipment; public transit operators; corrections officers; individuals supervising or instructing children; railroad and dock workers.
 - Occasional interaction with children is insufficient. *Lanier v. City of Woodburn*, 518 F.3d 1147, (9th Cir. 2008) (applicant for position as a library page who would occasionally staff the youth services desk at the library could not be compelled to submit to pre-employment drug and alcohol screening).

Employee Who Operates Motor Vehicle For Work

Employee that drives a city-issued vehicle for work – either while on the job or a take-home vehicle.

- Momentary lapse in attention could result in injury or death?? - certainly could encompass operating a car.

However, courts have held that the mere fact that an employee operates a city issued vehicle does not, in and of itself, make the position safety-sensitive.

Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007)

Employee Who Operates Motor Vehicle For Work (cont'd)

The safety risks involved with the motor vehicle operators carrying out their duties are no greater than the normal risks associated with vehicle use by the general public.

Therefore, requirement to operate a city vehicle as part of job duties, does not, in and of itself, make the position “safety-sensitive.”

Barrett v. Claycomb, 976 F.Supp 2d 1104 (W.D.Mo. 2013)

To Determine If Position Is Safety Sensitive, Courts Will Look At

- (1) Specific, actual, essential duties of job – do job duties pose a “special risk” to employee or others?
- (2) Employer’s/industry’s track record with respect to:
 - (a) record of job-related injuries/accidents;
 - (b) pattern of on-the-job intoxication;
 - (c) history of accidents attached to drug use.

To Determine Safety Sensitive, Courts Will Look At (cont'd)

- (3) Court will engage in specific scrutiny of potential dangers associated with intoxication and performance of job.
- (4) If position is not traditionally considered safety-sensitive, expect heightened scrutiny from courts.
- (5) If job duties change then position could change designation with respect to whether it is deemed “safety-sensitive.”

Post-Accident Testing

Post-accident drug testing also falls within the ambit of the Fourth Amendment.

- Certain licensure and federal/state regulations will govern the testing of certain categories of employee, i.e.,
 - (1) commercial motor vehicle operated on a public road in commerce (CDL),
 - (2) Federal Railroad Administration, etc.

Post-Accident (cont'd)

The following chart may be used to help determine if a mandatory DOT test needs to be performed: 48 CFR Part 382.303 – Commercial Motor Vehicles.

Type of Accident Involved	Citation Issued to the CMV Driver	Test Must Be Performed By Employer
i. Human Fatality	Yes	Yes
	No	Yes
ii. Bodily injury with immediate medical treatment away from the scene	Yes	Yes
	No	No
iii. Disabling damage to any motor vehicle requiring tow away	Yes	Yes
	No	No

- Alcohol test required if citation received within 8 hours of incident;
- Controlled substance test required if citation received within 32 hours of incident

Post Accident Testing for Non-Regulated Employees

- This discussion focuses on employees who are not governed by those regulations;
- No clear direction from courts;
- No clear precedent in the 11th Circuit;

Post Accident Testing for Non-Regulated Employees (cont'd)

- Consensus of decisions.
- Limit testing to those employees who have caused or contributed to occurrence of accident, i.e., “At-Fault” only.
- Place some reasonable parameters on extent of injury or damage necessary to trigger testing requirements, i.e.,
 - (1) fatality or personal injury requiring immediate medical treatment or results in at least one lost workday;
 - (2) significant property damage (i.e., in excess of a specified dollar amount)

Cases

Plane v. United States, 750 F. Supp. 1358 (W.D. Mich. 1990)

- Policy which required testing for employee involved” in accident, was too broad – not limited to persons who caused or contributed to accident.

National Treasury Employees Union v. Yeutter, 733 F. Supp. 403 (1990)

- Policy which required testing for employee that caused accident resulting in fatality, or hospitalization, or property damage in excess of \$10,000 was upheld.

Cases (cont'd)

American Federation of Gov. Emp. v. Sullivan, 744 F. Supp. 294 (1990)

- Policy which required testing regardless of fault, for accident resulting in as little as \$1,000 property damage, was too broad.
- Amount of property damage not sufficient to justify testing.

Connelly v. Newman, 753 F. Supp. 293 (N.D. Cal. 1990)

- Policy which allowed post-accident testing for property damage in excess of \$1,000 was too broad.

Cases (cont'd)

- *Bryant v. City of Monroe*, 593 F. App'x 291, 299 (5th Cir. 2014)
 - Policy that mandated drug testing following driver's collision with a stationary object was permissible
- *Am. Fed'n of Gov't Employees, Local 1616 v. Thornburgh*, 713 F. Supp. 359 (N.D. Cal. 1989)
 - Policy that allowed for drug testing after (1) an accident/unsafe act involving personal injury or death; (2) the same employee has more than one accident/unsafe act during a twelve month period; or (3) an accident/unsafe act that results in more than \$2,000 damage, was too broad
 - Same result in *Am. Fed'n of Gov't Employees, L-2110 v. Derwinski*, 777 F. Supp. 1493, 1502 (N.D. Cal. 1991)

Post Accident Summary

1. If you have reasonable suspicion, can test any employee post-accident, regardless of fault, amount of damage, injury, etc.
2. If employee is in a “safety-sensitive” position, can be tested post-accident regardless of fault, damage, injury.
3. If (1.) or (2.) above not present, then policy should only authorize testing on an at-fault employee, when there is resulting death or significant bodily injury (requiring medical attention) or significant property damage.
4. Dollar amount for PD to be deemed “significant” not clear - \$1,000 too low; \$10,000 acceptable.

Consent

1. Drug testing policy is not lawful just because employee/ applicant has “consented” to submit to testing as a condition of employment.
2. If consent is not freely and voluntarily given, it amounts to an “unconstitutional condition” and, therefore, not lawful.
3. Consent given under threat of losing job or being disqualified for employment has been deemed to be not freely or voluntarily given.

Lebron v. Secretary, Florida Dept. of Children and Families, 710 F.3d 1202 (11th Cir. 2013)

Medical Marijuana

(1) Medical marijuana/legalized marijuana

- can obviously take disciplinary action if employee is impaired on the job, but how do you prove impairment? Positive test for THC does not necessarily equate to impairment.
- may have to combine positive test result with observation of employee's conduct to support discipline.

(2) Some states allow employer to discharge employee for positive marijuana test even though use of marijuana is legal in the state, since it is still illegal under federal law.

Medical Marijuana (cont'd)

Coats v. Dish Network, LLC, 303 P.3d 147 (Colo. App. 2013) (Employee who tested positive for marijuana can legally be fired from job, even though state-licensed marijuana use was approved by voters and is considered lawful).

Curry v. MillerCoors, Inc., 2013 WL 4494307, at *6 (D. Colo. Aug. 21, 2013) (following *Coats*)

Roe v. TeleTech Customer Care, 171 Wash. 2d 736 (2011) (Washington Supreme Court held that state's medical marijuana laws do not protect medical marijuana users from adverse hiring or disciplinary decisions based on employer's drug testing policy).

Issue not yet addressed in Florida.

Conclusion/Recommendations

1. Review post-offer, pre-employment drug testing policies for job applicants: limit to testing only for safety-sensitive positions.
2. Review definitions of “safety-sensitive” for compliance with Florida statute/case law.
3. Review post-accident drug testing policies for compliance with principles discussed in presentation.
4. Realize that there are few bright lines and standards such as “reasonable,” “special risk,” and “important governmental interest” cause uncertainty and facilitate litigation.

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