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Comprehensive Pre-employment Drug Testing of Job Applicants for Municipal Positions

State of public employee drug testing law generally:

The current law of public employee drug testing is generally framed by the Supreme Court's decisions in Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989), and National Treasury Employees v. Von Raab, 489 U.S. 656 (1989). In these companion cases, the Court held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs the individual's privacy interest. In Skinner, the court found that public safety was such a special need. In Von Raab, the court found a special need in relation to customs agents who carry firearms or are directly involved in drug interdiction.

The federal courts spent the next decade defining which government interests qualified as "special needs" and defining the scope of those that qualified.

It soon became clear that "special need" meant little more than that the nature of the employee's job was extremely important, and that a great deal of harm could be done if the job was not performed properly. The courts did not require public employers to demonstrate that employees who used drugs were likely to create this harm, nor that there was any special difficulty with preventing the harm through normal supervisory methods.

The most commonly claimed special need has been public safety. The courts have almost always accepted this argument, especially in the transportation field. Motor vehicle operators, for example, were consistently held to be subject to random testing. This was true not only for interstate truck drivers (International Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292 (9th Cir. 1991), subway train drivers (Burka v. New York City Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990), and holders of commercial drivers licenses (Keaveney v. Town of Brookline, 937 F. Supp. 975 (D.

Mass. 1996), but also for employees who only chauffeur single individuals in passenger cars (National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990)).

The courts followed a very similar course where medical professionals were concerned. Where employees were involved in patient care, random testing was generally allowed. For example, the Fifth Circuit had no difficulty deciding that an emergency room physician was safety sensitive (Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997)). Similarly, the Northern District of California found that nurses and pharmacists were safety sensitive (AFGE v. Derwinsky, 777 F.Supp. 1493 (N.D. Cal. 1991)). Also found to be safety sensitive were scrub technicians (who assisted during surgery) (Kemp v. Claiborne County Hosp., 763 F.Supp. 1362 (S.D. Miss. 1991)) and emergency medical technicians (Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994)).

Many municipalities have attempted to establish random drug testing programs for police officers and fire fighters, arguing that such positions are inherently safety sensitive. Such arguments have generally been quickly accepted for police, largely on the basis of the fact that they carry firearms (a factor specifically mentioned in Van Raab). A typical case of this type is Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990), in which the court upheld random testing for police (and firefighters) in the city of Chattanooga. The supreme court of Massachusetts followed the same approach and reached the same result for police cadets in O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 557 N.E.2d 1146 (Mass. 1990).

The second most common special need claimed by government employers is security. Many agencies have attempted to institute random testing programs for employees who handle sensitive information.

The assertion that drug use creates a risk that sensitive information will be mishandled is anything but obvious. While the risks created by an airline pilot who got high on the job need no explanation, it is not apparent that someone who handles classified information while under the influence will do any harm. Nevertheless, courts have uncritically accepted this argument. The unstated rationale appears to be that if the potential harm from a job being done wrong is great enough, there is a special need that justifies random testing, even if there is no apparent nexus between drug use and poor job performance.

Consistent with this "principle", the District Court for the District of Columbia allowed random testing for executive department employees with security clearances that gave them access to classified material, but enjoined testing for those employees without security clearances, despite the government's claim that they had access to sensitive information. (Hartness v. Bush, 794 F. Supp. 15 (D.C.C. 1992), AFGE v. Sullivan, 744 F.Supp. 294 (D.D.C. 1990)). This was consistent with the D.C. Circuit's earlier decision allowing random testing for holders of both "secret" and "top secret" security clearances, and rejecting claims that only the latter were truly sensitive. (Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991)). The D.C. Circuit reached a consistent result in Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, sub nom, Bell v. Thornburgh, 493 U.S. 1056 (1990), allowing random testing of those

with top secret clearances, but enjoining testing for other federal prosecutors and other employees with access to grand jury proceedings.

The Ninth Circuit also took this approach, holding in AFGE, Local 1533 v. Cheney, 944 F. 2d 503 (9th Cir. 1991), that navy department civilian employees with top secret security clearances which gave them access to information whose disclosure could cause "exceptionally grave damage to national security" could be randomly tested.

Comprehensive testing of all applicants for employment:

Courts have generally resisted attempts to push the Skinner/Van Raab envelope to encompass large sections of the workforce. Still, they have been more accepting of pre-employment job testing of applicants as a condition of employment than of testing current employees (See, for example, Willner v. Thornburgh, 928 F2d 1185 (CA DC 1991, cert den 502 US 1020 (1991) and Transportation Institute v. United States Coast Guard, 727 F Supp 648 (D DC 1989)). With respect to universal testing of applicants for employment only a handful of courts have addressed this issue. As it is a still developing area of public employee drug testing law, such testing can not be definitively dismissed as violative of the Fourth Amendment. Nevertheless, the weight of authority does not support the legality of such testing.

In Loder v. Glendale, 14 Cal 4th 846 (1997), the California Supreme Court upheld pre-employment testing of job applicants for all city positions, regardless of the nature of the positions. The court concluded that employers had a greater need to conduct drug testing of job applicants than of current employees because they did not have the ability to observe such individuals in the context of employment and that testing of such individuals was less intrusive. The court accepted arguments regarding absenteeism, diminished productivity and greater health costs among justifications for across the board testing. Loder at 881-887.

The distinctions drawn in Loder and other courts between pre-employment testing of applicants and testing of current employees have been called into doubt by the Supreme Court in Chandler v. Miller, 520 US 305 (1997). In Chandler, the Court struck down a drug testing requirement requiring candidates for public office (in essence applicants) and gave no indication that the plaintiffs were entitled to any less protection than if they already held the positions sought. The justifications for such testing, including preserving the integrity of the office and public confidence and trust were insufficient to allow testing.

The reasoning in Chandler was followed in a lower federal court decision in invalidating a pre-employment testing program for all applicants for city government positions. In Baron v. Hollywood, 93 F. Supp 2d 1337 (SD Fla 2000), the court rejected the city's claim that the need to maintain a positive image and provide public assurances was sufficient to meet the "special needs" test. The court found that the city is required to

separately address the particular duties of each position to justify a drug test. The court concluded that “without identifying a connection between the jobs and the need for testing, the city cannot meet its burden of showing “special needs” (Baron at 1340-1342.)

The Court of Appeals in Washington, acknowledged and followed similar reasoning by borrowing 4th amendment analysis in finding that their state constitution did not support across the board testing of applicants for employment with the city. In Robinson v. City of Seattle, 10 P3d 452 (2000) the city had broadly categorized safety sensitive positions so as to include positions such as ushers and librarians. In addition the city offered justification including concerns such as efficiency and cost-reduction. The court found that drug testing of applicants must be narrowly tailored to meet a compelling state interest and therefore necessitated that only applicants for positions whose duties “genuinely implicate public safety” satisfy the standard (Robinson at 475).

Conclusion:

While some courts have set diminished standards for drug testing of applicants, the “special needs” test remains the standard by the majority of courts in determining whether a drug testing program for public employees meets 4th amendment requirements. While the number of cases dealing specifically with across the board testing by municipalities of applicants is limited, a clear majority have rejected such, requiring that the specific responsibilities of the job in question must be referenced in order to determine if the “special needs” test has been met. Uniformly testing applicants for employment without regard to type of position is completely inconsistent with principles set by the Supreme Court in Skinner and Van Raab and confirmed in Chandler. Though the law in this area is by no means settled the weight of authority does not appear to support across the board drug testing of applicants for employment by a municipality.

We believe a legal challenge to such a program is not only warranted in principle but supportable by law.