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## Governmental Employee Drug Testing - The Constitutional Issues

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## Governmental Employee Drug Testing - The Constitutional Issues

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Drug testing of employees in the private sector has become quite common. Local governments also have become interested in testing of employees to detect drug and/or alcohol use. Unlike employers in the private sector, however, governmental employers are limited by constitutional considerations. It is well settled that drug testing by government employers constitutes a “search” under the Fourth Amendment to the United States Constitution. Probable cause and a warrant are generally required for government searches, although the Supreme Court has carved out exceptions.<sup>[1]</sup> Even in those instances where testing is permitted under the Fourth Amendment, the due process clause and the equal protection clause of the Constitution prohibit certain practices and procedures in connection with the testing of employees. Local government employers can be held liable for monetary damages when an employee’s constitutional rights have been violated as a result of drug testing.<sup>[2]</sup>

The first cases decided by the United States Supreme Court involving employee drug testing were *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989), and *Skinner v. Railway Labor Executives’ Association*, 109 S.Ct. 1402 (1989). The Court adopted a balancing test to determine whether drug testing of government employees is constitutionally permissible, finding that the governmental interests in testing must be balanced against the employee’s liberty and privacy interests to determine whether a warrant, probable cause or individualized suspicion is required in the particular context. Unless there are “special needs beyond the normal need for law enforcement” which are sufficiently compelling to overcome the individual’s privacy interests, a warrant and probable cause are required. The Supreme Court found testing without a warrant permissible in three instances: (1) customs officers involved in front-line drug interdiction; (2) customs officers who carry firearms; and (3) train operators where a documented problem with drug/alcohol related accidents existed in the industry. The Court found that employees in these positions performed duties “fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” Since these decisions, lower courts have struggled with the limits of the Court’s rulings. Some courts have interpreted the rulings more broadly than others.

The Supreme Court again addressed the issue in 1997 in *Chandler v. Miller*<sup>[3]</sup> when the Court was asked to decide the constitutionality of a Georgia statute requiring candidates for state office to pass a drug test. The Court found that candidates for public office are not “safety sensitive” and cannot constitutionally be subjected to drug testing. In reaching this conclusion the Court reviewed the applicable law, noting that to be reasonable under the Fourth Amendment a search ordinarily must be based on individualized suspicion, but exceptions are sometimes warranted based on concerns other than law enforcement and in these special circumstances, courts must make a context-specific inquiry to determine whether individual privacy interests are outweighed by a sufficiently important governmental interest. In this case the Court found that Georgia showed no “special need” for the testing, so even though the method was found to have been relatively non-intrusive the testing was nonetheless unconstitutional. The Court held that “the preferred special need for drug testing must be substantial – important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>[4]</sup> The state argued that the testing was justified because unlawful drug use is incompatible with public office and calls into question the official’s judgment and integrity, it jeopardizes the discharge of public functions including anti-drug law enforcement, and it undermines public confidence and trust in elected officials. However, the Court found that the state showed no “concrete danger demanding departure from the Fourth Amendment’s main rule.”<sup>[5]</sup> The Court found that although a demonstrated problem with drug abuse is not necessary in all cases to the validity of a testing program, it does provide evidence of a need for the testing and in this case no such justification was present. The Court further noted that Georgia “offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage.”<sup>[6]</sup> The Court pointed out differences between this case and the circumstances present in the *Von Raab* case, including the fact that in *Von Raab* there was a demonstrated problem with bribery by drug smugglers and the employees worked in a situation where it was not feasible to subject them and their work product to “the kind of day-to-day scrutiny that is the norm in more traditional office environments.”<sup>[7]</sup>

The first question in the analysis is whether there is a valid public interest to be protected by drug testing. A generalized desire to eliminate drug and/or alcohol use among employees is not enough; the employer must have a “compelling interest” to be protected. In *Chandler*, the Court made it clear that much more

than a desire to show a symbolic commitment to the struggle against drug abuse is required to substantiate drug testing program.<sup>[8]</sup> In the *Von Raab* case, which allowed testing of certain officers in the U.S. Customs Service, the Supreme Court found that the federal government has a compelling interest in ensuring that customs officers who are directly involved in front-line drug interdiction and those who carry firearms are not drug impaired.<sup>[9]</sup> In the *Skinner* case, the Court found that in view of the demonstrated problem with drug and alcohol use among railroad operators and the grave harm caused by train accidents involving impaired operators, the government has a compelling interest in ensuring that train operators are not impaired by drugs or alcohol. The Court found that these classes of employees perform duties “fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” In *Skinner*, the Court also noted that employees with routine access to dangerous nuclear facilities also perform duties fraught with such risks.

If a local government employer wants to implement some form of drug and/or alcohol testing, it must first be determined who is to be tested and why it is necessary to test each particular group. Is there a documented drug or alcohol problem in the particular workforce? Is the group performing duties that are “fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences” similar to train operators, nuclear power plant operators, and customs agents who are directly involved in drug interdiction and who carry firearms? A compelling interest must be identified, other than the need for law enforcement, to justify the testing.

Once it has been determined that there exist sufficiently compelling “special needs” to ensure that a particular group of employees are not using drugs or alcohol, it should be determined whether there are other, less intrusive means to accomplish the objective. For example, would proper supervision of employees identify a drug or alcohol problem, or is the risk involved so great that more extreme measures must be taken?<sup>[10]</sup> Is supervision of the particular group impractical, as in long-haul truck drivers who perform their jobs alone for long periods of time without supervision?

If testing is determined to be the only effective means under the circumstances, the appropriate testing program must be considered. Several options or combinations of testing methods are generally employed: (1) job applicants, (2) employees who are reasonably suspected to be impaired as a result of drug or alcohol use, (3) all employees on a random or periodic (including annual physicals and return-to-work testing) basis, and/or (4) employees involved in an accident or other incident related to public safety. The testing program must be reasonably related to the special governmental needs to be served, with all of the circumstances being considered.

With regard to job applicants, courts have routinely held that government employers may require successful completion of a drug screening as a condition of employment in or promotion to a safety sensitive position.<sup>[11]</sup> In addition, it has been held that drug screening of an applicant is less intrusive where the applicant is already required to undergo a physical examination requiring a blood or urine sample.<sup>[12]</sup> However, wholesale testing of applicants for government employment without regard to the nature of the position has not been upheld in any court in this jurisdiction, and the Tennessee Attorney General is of the opinion that the practice is unconstitutional.<sup>[13]</sup> A federal district court struck down as unconstitutional a Georgia statute requiring routine testing of all applicants for state employment.<sup>[14]</sup> Accordingly, routine pre-employment testing should be used only for applicants who will occupy sensitive positions. Applicants should be informed in advance of the testing requirement, and testing should be limited to those who have been tentatively selected for the position.<sup>[15]</sup>

The United States Supreme Court has never approved any kind of testing for employees in non-sensitive positions, including suspicion-based testing.<sup>[16]</sup> However, reasonable suspicion testing is widely believed to be justified for all government employees, and the Tennessee Attorney General appears to be of the opinion that such testing is permissible regardless of the sensitive nature of the position.<sup>[17]</sup> Until the issue has been settled, it may be unwise to test any employees in non-sensitive positions. Even for employees in sensitive positions, the inquiry does not end here. There must be a reasonable, individualized suspicion of on-duty drug use or impairment.<sup>[18]</sup> Uncorroborated tips and “hunches” are not enough. In addition, courts have routinely held that suspicion of off-duty drug or alcohol use will not justify testing unless it results in on-the-job impairment. For example, a district court in Tennessee found that an employer’s concerns that off-duty drug use could impair performance on-site were legitimate for employees at the Oak Ridge nuclear weapons plant where the potential harm to society that could be caused by an impaired employee was “irretrievable” and “catastrophic.”<sup>[19]</sup> A statement quoted by the Tennessee Attor-

ney General is instructive on this point: "The state, as employer, simply has no business trying to ferret out private misconduct that does not affect job performance."<sup>[20]</sup>

Random testing is the most problematic of all the testing methods, and courts have been reluctant to allow random testing except in situations where the potential for harm to the public as a result of employee impairment is particularly compelling. Courts have been reluctant to subject the average public employee who has given no indication of wrongdoing to a procedure so offensive as being compelled to produce bodily fluids for examination by his or her employer. Random testing has been upheld by the Supreme Court for customs agents involved in front-line drug interdiction and those who carry firearms, and customs agents who are entrusted with truly sensitive classified information affecting national security. Federal district courts in Tennessee and the Sixth Circuit Court of Appeals have allowed random testing of firefighters, policemen who carry firearms and workers at nuclear weapons plants.<sup>[21]</sup> Other courts have allowed random testing only in positions that have been determined to involve compelling public safety concerns. The courts are by no means uniform in their determination of what constitutes a sufficient public safety concern to justify random testing, and the law is rapidly developing as new cases are decided and old ones overturned. The Tennessee Attorney General has issued an opinion that random testing is unconstitutional unless the position involves public safety, and an opinion that blanket random testing of all county employees and elected officials would not pass constitutional muster.<sup>[22]</sup> Although the Tennessee Supreme Court has not made any determination on this issue, the Massachusetts Supreme Court has determined that random drug testing, even of police and firefighters, is unconstitutional under the Massachusetts constitution.<sup>[23]</sup>

Post-accident testing was allowed by the Supreme Court in *Skinner* for railroad employees who were directly involved in an accident. The testing must be limited to those employees who actually could have caused the accident. Lower courts, including the Sixth Circuit, have allowed post-accident testing of mass transit drivers.<sup>[24]</sup> Written policies and procedures must be in effect and the information disseminated to the employees.

Even where testing is justified at its inception, it also must be reasonable in its implementation. The testing must be pursuant to established policy and not subject to the discretion of officers in the field. "An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents."<sup>[25]</sup> When the warrant and probable cause requirements are removed, other safeguards are necessary to replace them. Both the circumstances justifying the testing and the permissible limits of the intrusion must be defined narrowly and specifically, and the policies and procedures must be known to employees who are subject to testing. All reasonable measures must be taken to protect the employee's privacy rights. The employees should be informed in advance of the times they will be tested. The tests must be performed by qualified personnel and care must be taken to ensure the accuracy of the test results. The act of production of the sample should not be observed unless there is reason to believe that the sample will be adulterated. The test results must be kept confidential. If the test results are positive, another test must be administered to confirm the positive result and the employee must be given an opportunity to offer reasonable explanation.

Must the employer have a policy in place before testing an employee based on reasonable suspicion? Federal agencies effectively cannot test their employees until a policy and comprehensive standards and procedures are in place.<sup>[26]</sup> A written policy and procedures for testing should be established prior to testing any employees, and it is not recommended that testing of any kind be employed prior to the implementation of policies and procedures. However, under exigent circumstances, such as where the position involves extremely dangerous activities with vital public safety interests at stake and the employer has reliable evidence of an employee's on-the-job impairment, courts might be more likely to allow suspicion-based testing in the absence of written policies and procedures.<sup>[27]</sup> However, the need for such testing should be very rare.

Although local governments are not required to use federal guidelines (unless a federal grant is involved), the U.S. Department of Health and Human Services (HHS) has issued mandatory guidelines for testing federal employees that may be used as an example for developing a testing program. Also, the National Institute on Drug Abuse (NIDA) has developed a comprehensive drug-free workplace program that includes testing. A program modeled after the federal guidelines and NIDA's model program would likely withstand constitutional challenge. Under the HHS guidelines, federal agencies are required to use laboratory facilities that have been certified by the federal government. The guidelines set out the criteria

for certification of a facility. Any testing facility that an employer plans to use should be on the federal list of certified facilities, or an independent investigation of the facility should be made to determine whether it meets the federal criteria. The use of testing facilities that do not employ reliable methods and follow proper procedures may cause a program to be unconstitutional.

The employer should thoroughly investigate the alternative testing methods available, to determine accuracy and reliability as well as the ability to detect on-the-job impairment. For example, using a breath test for alcohol or a saliva test for marijuana may be more effective in limiting the search to on-the-job use and may make the testing more reasonably related to its objective. The federal guidelines and NIDA model contain specifications for testing methods. The list of substances that will be included in the testing also must be determined. The testing should be limited to substances that are believed to be prevalent in the general population, and should not include substances that are not believed to affect job performance.<sup>[28]</sup> Local law enforcement officials or the county health department may be of assistance in this regard.

[1] The "special needs" exception to the warrant requirement includes warrantless searches of buildings by health and safety inspectors and other administrative searches. This "special needs" exception appears to be the basis for allowing drug testing of government employees, although arguably the administrative search exception was intended only for searches of places and things, and was never intended to extend to intrusive bodily searches. The cases dealing with warrantless searches of persons generally involve law enforcement action and have required exigent circumstances and individualized suspicion. Drug testing of government employees falls somewhere between these two types of searches. An analysis of the development of the exceptions to the warrant requirement is beyond the scope of this publication. For additional information, see Schulhofer, *On the Fourth Amendment Rights of the Law Abiding Public*, 1989 Sup.Ct Rev. 87; Note, *Governmental Drug Testing: A Question of Reasonableness*, 43 Vand. L. Rev. 1343 (1990).

[2] See, e.g., *Johnson v. City of Plainfield*, 731 F. Supp. 689 (D. N.J. 1990) (city held liable for monetary damages under § 1983 because it awakened police officers and firefighters while at work for unannounced mass urinalysis, observed by testing agents; those who tested positive were immediately terminated; the city had no written policy); *Capua v. City of Plainfield*, 643 F. Supp 1507 (D. N.J. 1986) (city's testing violated employees' 14th Amendment right to due process: no prior notice, failure to promulgate standards, failure to protect confidentiality, failure to provide copies of results, and failure to provide pre-termination hearing).

[3] 520 U.S. 305, 117 S.Ct. 1295 (1997). See also, *Lanier v. City of Woodburn*, 518 F.3d 1147 (9<sup>th</sup> Cir. 2008).

[4] 520 U.S. at 318.

[5] 520 U.S. at 319.

[6] 520 U.S. at 320.

[7] 520 U.S. at 321.

[8] 520 U.S. at 322.

[9] The Supreme Court also determined that the government had a compelling interest in safeguarding truly sensitive government secrets which are vital to national security, and that employees who handle such information may be tested. However, it is doubtful that there exists in local government any "classified" information which could be considered vital to national safety and security.

[10] See *Skinner*, at 1419 (railroad operators "can cause great human loss before any signs of impairment become noticeable to supervisors or others").

[11] See *Knox Co. Education Ass'n. v. Knox Co. Board of Education*, 158 F.3d 361 (6<sup>th</sup> Cir. 1998); see also, *Friedenberg v. School Board of Palm Beach County*, 911 F.3d 1084 (11<sup>th</sup> Cir. 2018).

[12] See *City of Annapolis v. United Food and Commercial Workers Union Local 400*, 565 A.2d 672 (Md. 1989) (police and firefighters required to submit to periodic drug tests as part of annual physical).

[13] Op. Tenn. Att'y Gen. 89-66 and 90-70 (testing allowed only for safety-sensitive positions).

[14] *Georgia Association of Educators v. Harris*, 479 F. Supp. 1110 (N.D.Ga. 1990).

[15] The ADA prevents employers (42 U.S.C. §12112(c)(2)(A)), and the Rehabilitation Act prevents recipients of federal funds (28 C.F.R. § 41.55), from administering physical examinations to an applicant before a job offer has been made. Although the ADA expressly provides that a drug screening for the illegal use of drugs does not constitute a "physical examination" under the ADA (42 U.S.C. § 12114(d)(1)), testing for anything other than illegal drug use (e.g., prescription drugs) would be governed by the ADA. The safest practice would be to require testing only after the offer has been made, with employment being conditioned upon the test results.

- [16] Conversely, the Supreme Court has never invalidated suspicion-based employee drug testing. See also *Relford v. Lexington-Lafayette Urban County Government*, 390 F.3d 452, 2004 WL 2674289 (6<sup>th</sup> Cir. 2004).
- [17] Op. Tenn. Att'y Gen. 89-66 (4/28/89).
- [18] *Smith Co. Education Assn. v. Smith Co. Bd. of Education*, 781 F. Supp.2d 604 (M.D. Tenn. 2011).
- [19] *Ensor v. Rust Engineering*, 704 F. Supp. 808 (E.D. Tenn. 1989). For employees such as law enforcement officers who are directly involved in drug enforcement activities, off-duty use of illegal drugs may be sufficiently related to job performance to justify testing. See *Von Raab*, at 1395.
- [20] Op. Tenn. Att'y Gen. 86-199 (quoting Op. Md. Att'y Gen. 86-055). See also *National Federation of Federal Employees v. Cheney*, 742 F. Supp. 4 (D.D.C. 1990) (government had no interest in off-duty drug use unless it resulted in on-duty impairment).
- [21] *Ensor v. Rust Engineering*, 704 F. Supp. 808 (E.D. Tenn. 1989) (upheld random urinalysis at Oak Ridge nuclear weapons plant under comprehensive written policy); *Penny v. Kennedy*; *Lovvorn v. City of Chattanooga*, 915 F.2d 1065 (6th Cir. 1990) (vacated prior holdings in companion cases to allow mandatory drug testing of police and firefighters after *Von Raab* and *Skinner*, but remanded for further consideration of whether testing program was carried out in a reasonable manner under proper standards).
- [22] Ops. Tenn. Att'y Gen. 89-66 (4/28/89) and 17-23 (3/31/17).
- [23] *Guiney v. Police Commissioner of Boston*, No. 582 N.E.2d 523 (Mass. 1991) (finding that the Massachusetts constitution confers rights beyond those granted under the federal Constitution).
- [24] See *Tanks v. Greater Cleveland Transit Authority*, 930 F.2d 475 (6th Cir. 1991) (post-accident drug testing of bus driver upheld).
- [25] *Skinner*, at 1415.
- [26] Congress has refused to make any funds available for testing within government agencies until the policies and procedures are in place. Pub. L. 100-71, Title V, § 503, July 11, 1987, 101 Stat. 468.
- [27] A Florida state court has held that the existence of a policy is not essential when a public employer has reasonable suspicion, particularly where the position involves public safety such as a dispatcher for the sheriff's department. *Fowler v. Unemployment Appeals Commission*, 537 So.2d 162 (Fla. Dist. Ct. App. 1989).
- [28] Tests that reveal prescription drugs taken for a condition that constitutes a disability under the Americans with Disabilities Act (ADA) may raise questions under the ADA, and if the drug tests reveal anything other than current illegal drug use, the results must be kept confidential in accordance with the requirements of the ADA.

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