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Texas



**WEEDING OUT BAD EMPLOYEES:
RANDOM DRUG TESTING AND
CITIES
2023 UPDATE**
(Taylor's Version)

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Dallas, Texas
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Laura Mueller
City Attorney
City of Dripping Springs

This is Why We Can't Have Nice Things: Constitutional Limitations on Suspicionless Drug Testing

- Suspicionless/Random Drug Testing occurs when an employee or applicant is drug tested without individualized suspicion
 - Only reasonable suspicion is needed to overcome this standard
 - Only safety or security sensitive employees or applicants can be a part of suspicionless/random drug testing program
 - CDL holders have to be drug tested

- What this means:
 - No quarterly random testing
 - No pulling names out of pumpkins
 - No drug testing elected officials
 - Everything has been documented



"I have this thing where I get older, but never wiser."-T.S.



Look What You Made the Union Do: Drug Testing Litigation

- *Lanier v. City of Woodburn*, 9th Circuit
- *Nat'l Treas. Emps. Union v. Von Raab*, U.S. Sup. Ct.
- *Skinner v. Ry. Labor Execs. Ass'n*, U.S. Sup. Ct.
- *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 11th Circuit

“Nonetheless, convenience cannot override the commands of the Constitution.”

Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott, 717 F.3d 851, 882 (11th Cir. 2013)



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“I got a list of names, and yours is in red, underlined I check it once, then I check it twice”

Illicit Affairs: Proving Reasonable Suspicion

Individualized Suspicion

- Vehicular Accidents (on the job) when there is some proof of negligence
- On-the-Job Behavior
- Recent Arrests or positive drug test

Mere hunches are not enough.

“But some guy said my aura’s moonstone, just ‘cause he was high.”



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“Nothing in defendants’ filings explains why employees who make too many personal telephone calls may reasonably on that account be subjected to drug tests. Nor is there any appreciable link between drug use and oversensitivity to criticism, preoccupation with personal problems, or erratic work habits. Likewise, it defies common sense to assert that an off-the-job injury is symptomatic of drug abuse. The proposition that long lunch breaks are indicia of drug abuse is nothing short of ludicrous; there are dozens of more likely reasons.” -- Nat’l Fed. Of Fed. Emps, AFL-CIO v. Cheney, 742 F.Supp. 4 (D.C.D.C. 1990).

I Can See You: Federal Individualized Suspicion Example

Federal Office of Human Resources Management



- Direct observation of drug use and/or the physical symptoms of being under the influence of drugs or alcohol
- A pattern of abnormal conduct or erratic behavior
- 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 trafficking
- Information either provided by reliable and credible sources or independently corroborated
- Newly discovered evidence that the employee has tampered with a previous drug test



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*“A dwindling, mercurial high
A drug that only worked
The first few hundred times”*

Lavender Haze: Consequences of Legalized THC and CBD

- THC is legally available in Hemp and CBD products
- CDLs who test positive can have consequences
- Legal drug use, prescription or over-the-counter, can impair performance
- Is the THC/CBD prescribed by a doctor?
- Treat THC the same as alcohol?
- Does your City want to penalize employees who test positive for THC?



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*"It's me / Hi / I'm the
problem, it's me"*

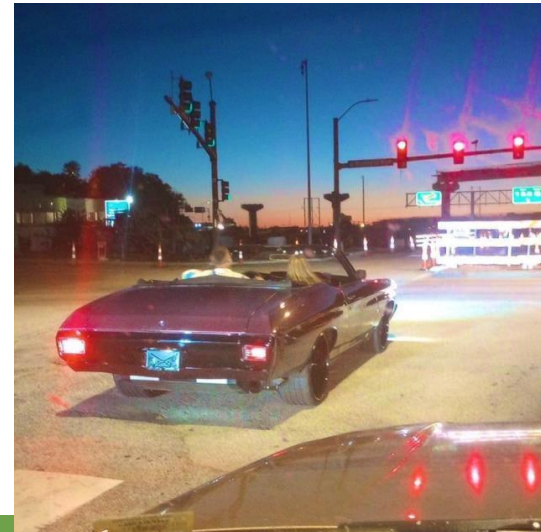
I've Got a Blank Space: Drug Testing Policies

1. Constitutionality – limit suspicionless drug testing to appropriate employees and applicants
2. Deal with CBD/THC use or use of other legal drugs and prescriptions can affect their job performance
3. Procedures for ADA Interactive Process
4. Individualize Suspicion factors with education procedure for supervisors
5. In writing, documentation, training for supervisors and employees
6. Commercial Drivers Licenses-Required Drug Testing

Is there value in drug testing employees?



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"All I do is try, try, try."

Snow on the Beach: Drug Testing Policies

Guidance from the Texas Workforce Commission:

- What will be considered a violation? (necessary)
- Which employees will be covered? (necessary)
- What disciplinary measures will result from violations? (necessary)
- Will the company allow rehabilitation? (optional - not required by any Texas or federal law)



Question...?



"It's just a question."