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EMPLOYEE DRUG TESTING

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TABLE OF CONTENTS

I. Introduction

Employers may choose to drug test their employees as a means to avoid employing individuals who use illegal drugs, reduce the risk of having impaired employees in the workplace, or to deter drug abuse and catch signs of abuse early. While these goals are laudable and may make good business sense, public employers that wish to implement drug testing policies must avoid infringing on employees' constitutional rights.

This paper provides an overview of the legal framework public employers must work within when implementing drug testing policies, including when public employers may drug test, the types of job positions for which random or across-the-board drug testing is permissible under the law, and the legal standards employers must satisfy. This paper also recommends ways employers can develop and implement drug testing policies that will withstand legal challenges.

II. Special Need and the Safety-Sensitive Standard

a. The Fourth Amendment Controls

It is well established law that a governmental entity's collection of blood, breath, hair, or urine is considered a search under the Fourth Amendment of the United States Constitution, which prohibits unreasonable governmental searches and seizures. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989). Thus, when the federal government, the state, a city, or other local government obtains bodily samples for purposes of conducting a drug test of an applicant or employee, the governmental entity must do so within the confines of the Fourth Amendment, weighing the individual's Fourth Amendment protections against the government's legitimate interests. *Id.* at 619. In applying this framework, the Supreme Court has created two exceptions to the requirement that all searches must be conducted pursuant to a warrant; instead, for drug testing, no warrant is required and a government may drug test its applicants or employees if the government can show a "special need" or when there is "reasonable suspicion" of drug use. *See id.* at 634.

Because the Fourth Amendment applies only to governmental searches and seizures, employers in the private sector are free to drug test applicants and employees, as long as doing so does not interfere with other statutory provisions. This distinction between the limits of public and private employers with regard to drug testing is not well-known or understood, causing much confusion and opening public employers' to unnecessary legal liability.

b. Safety-Sensitive Positions and the *Skinner* Standard

In *Skinner*, the U.S. Supreme Court explained how a governmental entity can meet the special needs test. "Special needs" may include testing for positions that are safety-sensitive, high-security, or that involve the detection of illegal drugs. *See, e.g., id.* at 620 (railroad employees engaged in operation and maintenance functions could be randomly drug tested because positions were safety-sensitive); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs Service employees responsible for interdiction of drugs, or who carry a firearm could be randomly drug tested due to security and drug concerns). To determine whether

special needs exist, a court must make a fact-specific inquiry that weighs the competing public and private interests of administering the drug test. *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

The most likely scenario under which public employees can be legally tested without individualized suspicion is for a safety-sensitive position. A safety-sensitive position is one "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences." *Skinner*, 489 U.S. at 628. Governmental employers should analyze each safety-sensitive position to determine whether there is a connection between the duties of the position to be tested and the nature of the feared violation. *Am. Fed'n of Gov't Employees v. Derwinski*, 777 F.Supp. 1493, 1497 (N.D. Cal. 1991). Even if safety-sensitive, the government's interest in performing the drug test must be compelling, which means the government is conducting the test to (1) maintain the integrity of workers in executing their essential mission; (2) enhance public safety; or (3) protect truly sensitive information, such as national security secrets. *See Harmon v. Thornbrugh*, 878 F.2d 484, 488 (D.C. Cir. 1989).

While a police officer is clearly safety-sensitive, and a secretary conducting routine filing is not safety-sensitive, many positions fall in a gray area somewhere in between. An analysis is highly fact-specific and sometimes subjective. Courts have found the following positions to be eligible for random, suspicion-less drug testing:

- Civilian engineers working for the U.S. Navy. *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991) (holding that anyone with a top-secret security clearance is a grave enough risk to national security to make random urinalysis reasonable, regardless of exposure to secret documents). Note that this designation is based on security, not physical, risks.

- A custodian at an elementary school. *Aubrey v. School Board of Lafayette Parish*, 148 F. 3d 559 (5th Cir. 1998) (a custodian's duties qualified as safety-sensitive where he used various chemicals, made minor repairs to buildings, and was constantly in the presence of elementary-aged children). However, simply working in an environment where children are present is not sufficient to make a position subject to random drug testing, at least in the 9th Circuit. *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (holding that, unlike school teachers, librarians do not have an *in loco parentis* responsibility for caring for children and therefore the link between drug screening a librarian and the city's interest in protecting children was "tenuous at best.").

- Crew leader in the Public Works Department, who drove city-owned pickup trucks, supervised and transported a crew of workers, operated heavy groundskeeping equipment, worked with pesticides, and worked in high-risk traffic areas on highway medians. *Bryant v. City of Monroe*, 593 F. Appx. 291 (5th Cir. 2014) (unpublished opinion) (holding that "while [the crew leader's] duties may be less safety-sensitive than those of the railroad employees in *Skinner*, they are on the same level as the duties of the school custodian in *Aubrey* . . . which we held to be sufficiently safety-sensitive to justify drug testing.").

- Positions that require a Commercial Driver's License ("CDL") or are otherwise regulated by the U.S. Department of Transportation ("DOT"). DOT regulations require random drug testing for commercial drivers. 49 C.F.R. § 382.

- Sanitation department workers operating dump trucks in positions that do not require a CDL and are not otherwise covered by DOT regulations. *Kreig v. Seybold*, 481 F.23d 512 (7th Cir. 2007).

Courts have found the following positions **not** to be safety-sensitive:

- Elevator mechanic. *Am. Fed'n of Gov't Employees v. Derwinski*, 777 F.Supp. 1493, 1500-01 (N.D. Cal. 1991).

- Industrial equipment mechanic. *Id.*

- Candidates for state office. *Chandler v. Miller*, 520 U.S. 305 (1997) (state sought to test all candidates "to display its commitment to the struggle against drug abuse," yet symbolic purposes alone do not overcome Fourth Amendment protections).

- Power distribution maintainers. *Burka v. New York City Transit Auth.,* 751 F.Supp. 441, 444 (S.D.N.Y. 1990) (court particularly focused on fact that maintainers were not responsible for turning on and off electric currents).

- Sanitation employee responsible for enforcement of public health and sanitation laws. *Watson v. Sexton*, 755 F.Supp. 583 (S.D.N.Y. 1991).

- Applicant for library page position. *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008).

While the above lists are not exhaustive, a recurring theme of a safety-sensitive job is one that can subject the public to imminent danger, thus justifying the intrusion into the employee's Fourth Amendment privacy right as weighed against the government's legitimate interests.

III. Diminished Expectations of Privacy for Employees of Certain Industries

Employees who work for heavily regulated industries such as utilities have a diminished expectation of privacy regarding their right to be free from drug testing. *Bailey v. City of Baytown*, 781 F.Supp. 1210, 1216 (S.D. Tex. 1991) (holding operator at wastewater treatment plant had diminished privacy expectation because of regulated nature and because he knew there was a drug-testing policy in place). Indeed, the U.S. Supreme Court has stated a diminished expectation of privacy attaches to employment in an "industry that is regulated pervasively to ensure safety." *Skinner*, 489 U.S. at 1418. The U.S. Supreme Court noted that railroad employees were often subject to routine physical examinations, also diminishing their expectations of privacy. *Id.* In another case, civil employees at a chemical weapons plant had a diminished expectation of privacy because of the regulated nature of the field, and thus were also subject to random drug testing. *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989). Therefore,

under these cases, certain city workers in highly regulated industries that may not otherwise be safety-sensitive could arguably be eligible for random drug testing.

IV. Testing Job Applicants

Across-the-board drug testing in a *pre-employment* context is likewise unconstitutional when conducted without individualized suspicion or some type of special need. The candidate must be applying to a safety-sensitive or security-sensitive position to be subject to pre-hire testing. In *Chandler v. Miller*, the U.S. Supreme Court held unconstitutional a Georgia state law requiring candidates for certain elected offices to pass a urinalysis drug test. *Chandler v. Miller*, 520 U.S. 305 (1997). The law was not enacted in response to any evidence of a drug problem among the state's elected officials; the officials covered under the law typically did not perform high-risk, safety-sensitive tasks; and the certification that candidates were required to submit did not help in any drug-interdiction effort of the type found in *Von Raab*. The legislature simply meant the law to be a statement that Georgia did not condone drug abuse, and a symbolic statement is insufficient justification for suspicion-less testing. *Chandler*, 520 U.S. at 307 ("What is left, after close review of Georgia's scheme, is that the State seeks to display its commitment to the struggle against drug abuse . . . The need revealed is symbolic, not 'special.' The Fourth Amendment shields society from state action that diminishes personal privacy for a symbol's sake.").

Chandler was further bolstered in 2008, when a federal appeals court held it unconstitutional for the City of Woodburn, Oregon to require an applicant for library page to submit to a drug test where a city policy required job candidates selected for hire to submit to a drug test as a condition of employment. *See Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008). The policy stated:

> *Drug and Alcohol Tests:* As a drug-free workplace . . . The City of Woodburn requires a pre-employment drug and alcohol screen for all prospective applicants. The candidate of choice for a City position must successfully pass the drug and alcohol screen as a condition of the job offer. The confirmed presence of any illegal drug or alcohol in a urine sample will be cause for disqualifying an applicant.

Id. The City of Woodburn argued unsuccessfully that the policy was necessary because (1) drug abuse is one of the most serious problems confronting society today; (2) drug use has an adverse impact on job performance; and (3) children must be protected from those who use drugs or could influence children to use them. None of these generalized concerns was sufficient to convince the court the city had "special needs" related to the library position that could justify circumventing applicants' Fourth Amendment rights. *Id.* at 1149.

Moreover, in 2012, a federal court in Florida held that an executive order issued by Governor Rick Scott to drug test all applicants to state jobs, and to randomly drug test existing state employees, was unconstitutional. *Am. Fed'n of State County & Mun. Employees Council 79 v. Scott*, 857 F. Supp. 2d 1322 (S.D. Fla. 2012). An employee union sued, alleging the searches violated their Fourth Amendment rights. The Governor listed reasons for the testing that

included: improving health and safety in the workplace, promoting productivity, saving taxpayer money, and reducing theft. None of these reasons justified the across-the-board testing, nor did the large amount of data about drug abuse presented by the Governor, which the court found was too generalized to show the government had a specific, special need to test for every position. *See id.* at 1335 ("Most, if not all of the Governor's supporting exhibits lack probative value because they operate at such a high level of generality . . . The studies do not describe the risks associated with drug users performing the specific jobs held by the Florida state employees covered by the [executive order].").

On appeal, the 11th Circuit Court of Appeals agreed with the trial court that the governor's order to test across-the-board was too broad. However, it also said the trial court's decision was too broad and should have made clear that the state *can* drug test applicants and employees in safety-sensitive positions, just as *Skinner* allows, as long as it affirmatively proves the testing is justified. *Am. Fed'n of State County & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 882 (11th Cir. 2013) (". . .the State must come forward with the requisite special-needs showing for all categories of employees it seeks to test. For some categories, this showing may turn out to be quite simple and may amount simply to describing precisely the nature of the job and the attendant risks."). The U.S. Supreme Court declined to hear the Governor's case in 2014, leaving in place the 11th Circuit's decision, and keeping the burden of proof squarely on the employer to show the position is safety or security-sensitive.

Thus, no governmental entity can conduct across-the-board drug testing of applicants. However, a governmental entity such as a city can drug test applicants for positions it can prove are safety-sensitive or security-sensitive, whether randomly, at scheduled intervals, or for changes in job status such as promotions.

V. Reasonable Suspicion Drug Testing

In the absence of meeting the special needs requirement, courts have held that a government employer may legally test its employees if it has a reasonable suspicion that an employee is engaging in illegal drug use or drug abuse while on the job. *See, e.g., Nat'l Treas. Employees Union v. Yeutter*, 918 F.2d 968, 975-76 (D.C. Cir. 1990) (citing *Skinner*, 489 U.S. at 624) (*Skinner* states that, in the absence of a special need, warrant or probable cause, "some quantum of individualized suspicion" is required to drug test an employee). The reasonable suspicion standard, which is easier to satisfy than probable cause, is permissible because it is considered less intrusive than random testing since it is conducted as a result of the employee's own conduct. *Int'l Broth. Of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1464 (9th Cir. 1990). For example, in *American Federation of Government Employees v. Martin,* 969 F.2d 788, 792-93 (9th Cir. 1992), the Department of Labor's reasonable suspicion drug testing plan, which provided that reasonable suspicion may be based on "observable phenomena, such as direct observation of drug use or possession and/or physical symptoms of being under the influence of a drug" was held to be permissible. A gut feeling or rumor will not be enough.

VI. Post-Accident Drug Testing

Post-accident drug testing, similar to testing based on a reasonable suspicion, is also considered less intrusive than random drug testing since it is based on a triggering event. The Supreme Court upheld post-accident drug testing in *Skinner*, noting that such testing provides "invaluable information" in determining the cause of serious accidents, as well as empowers the government to undertake "appropriate measures to safeguard the general public" by, in the case of positive drug test, pointing to drug use as a potential cause of a workplace accident and, in the case of a negative drug test, eliminating drug use as the cause. *Skinner*, 489 U.S. at 630. However, across-the-board testing after any work-related injury for all employees, without showing individualized suspicion, a special need, or a nexus between the injury and drug impairment, is impermissible. *See United Teachers of New Orleans v. Orleans Parish School Bd.*, 142 F.3d 853, 857 (5th Cir. 1998) (policy requiring drug test after teachers, teachers' aids, and clerical workers suffered workplace injury invalid). Similarly, California's Northern District has stated that, for post-accident drug testing to be permissible under the Fourth Amendment, the government "must show at a minimum that the events triggering testing meet some threshold of severity in terms of potential harm and actual personal injury or property damage" and that the testing should only cover employees who may have caused the accident. *Amer. Fed. of Gov't Empl. Local 1533,* 754 F.Supp. 1409, 1418 (N.D. Cal. 1990). For example, an employee who is rear-ended in a vehicle or has a piece of equipment fall on him, through no fault of his own, should not be subject to drug testing for the sale reason of involvement in the accident.

VII. Conclusion

Public employers have a higher duty to their public employees than private employers, since the Fourth Amendment applies to governmental, rather than private actions. Thus, in developing a drug-testing policy, public employers must weigh the government's interest against the employee's privacy interest, considering the job's duties, the need for testing, the nature of the work environment, and safety concerns. Employers that wish to drug test are encouraged to include a drug-testing policy in their employment handbook that applies to each employee equally, sets out the specific triggering events for post-accident and reasonable suspicion drug testing, and lists the positions that are subject to random testing as safety-sensitive positions.[1] Employers that currently conduct random drug testing should audit the subject positions to ensure they qualify as safety- or security-sensitive. In doing so, public employers will increase the chance that their policies will withstand legal scrutiny.

[1] Employers must also keep drug test results, other than a statement of pass or fail, separate from an employee's personnel file and that file must remain confidential as medical condition or history information under the Americans with Disabilities Act. 42 U.S.C. § 12112(d)(3)(B).