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Public Employee Drug Testing Updates January 2016

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While many private employers have broad policies requiring drug testing for employees and applicants, public employers are subject to more stringent drug-testing restrictions due to the constraints imposed by the Fourth Amendment of the Constitution. This article summarizes the Constitutional implications applicable to drug testing by public sector employers.

I. Fourth Amendment Protections

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend IV. This includes protecting public employees from unreasonable searches from their government employer. In *Skinner v. Ry. Labor Execs.' Ass'n*, the United States Supreme Court held that drug testing constitutes a search for purposes of the Fourth Amendment. 489 U.S. 602, 617 (1989). Accordingly, to be proper under the Fourth Amendment, the drug testing pf a public employee must be deemed reasonable. *American Federation of State, County and Municipal Employees Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013) (*AFSCME*) (citing *Chandler v. Miller*, 520 U.S. 305, 313 (1997)).

A. Determining "Reasonable"

In determining the reasonableness of a drug test in the employment context, the "default rule . . . is that 'to be reasonable under the Fourth Amendment, a search must ordinarily be based on individualized suspicion of wrongdoing.'" *AFSCME*, 717 F.3d at 866 (quoting *Chandler*, 520 U.S. at 313). Individualized suspicion requires the employer to have reason to believe a particular employee is under the influence of drugs. However, "[w]hile individualized suspicion is the normal requirement, 'particularized exceptions to the main rule are sometimes warranted based on **special needs**, beyond the normal need for law enforcement.'" *AFSCME*, 717 F.3d at 866 (quoting *Skinner*, 489 U.S. at 624).

In determining whether such special needs justify the search under the Fourth Amendment, "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advance by the parties." *AFSCME*, 717 F.3d at 866 (quoting *Skinner*, 489 U.S. at 624). As the Supreme Court noted:

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. *Skinner*, 489 U.S. 624.

Applying these standards, in 2013 the Eleventh Circuit articulated the relevant inquiry to determine the appropriateness of drug testing as "a job-category-by-category balancing of the individual's privacy expectations against the Government's interests, with other relevant factors being the character of the intrusion – particularly whether the collection method affords a modicum of privacy – and the efficacy of the testing regime." *AFSCME,* 717 F.3d at 867 (internal citations omitted).

B. Reasonableness Applications to Employees

Special needs for employee drug-testing exist when government employees are 'engaged in safety-sensitive tasks,' particularly those involved with the operation of heavy machinery or means of mass transit, and accordingly these employees may be subject to drug testing without reasonable suspicion. *AFSCME,* 717 F.3d at 867 (quoting *Skinner*, 489 U.S. at 620).

Additionally, U.S. Customs Service, and potentially other government employers, have a special need to justify drug tests of employees who are directly involved in drug interdiction or who carry a firearm. *Nat'l Treasury Emps. Union v. Von Raab* 489 U.S. 656 (1989). The handling of classified material *may* constitute a special need to justify a drug test, as the protection of "truly sensitive information" is compelling, but this determination would necessarily be specific to the particular job. 489 U.S. at 677- 78.

In contrast, across-the-board drug testing of all candidates for certain state elected positions, is not permissible because a special need is not substantial enough to override the privacy rights of the individuals. *Chandler*, 520 U.S. 305. The risk associated with these political positions is not high enough to mirror the risks associated with the aforementioned U.S. Customs officers, who are regularly exposed to drug-based crime. 520 U.S. at 318.

Nor is across-the-board, suspicion less drug testing permissible for all state employees in Florida. To that end, the Eleventh Circuit rejected the State of Florida's arguments that an Executive Order implemented by the Governor, which required across-the-board suspicionless testing of all employees of the State, passed Constitutional muster under the Fourth Amendment. *AFSCME*, 717 F.3d at 873-75.

Generalized notions and desires for a safe, productive and efficient workplace are not sufficient to establish a special need to justify suspicionless drug-testing. *AFSCME*, 717 F.3d at 861. On the contrary, determining the existence of special needs is a "fact-intensive" process that "pays due consideration to the characteristics of a particular job category (e.g., the degree of risk that mistakes on the job pose to public safety), the important privacy interests at stake, and other context-specific concerns (e.g., evidence of a preexisting drug problem). *AFSCME*, 717 F.3d at 873.

Accordingly, if an employer is seeking to impose a drug testing policy on its public employees it should be able to reasonably articulate with specificity the reasons for the drug testing and the special needs under the specific positions that warrant testing. An employee seeking public employment should consider the potential for drug testing by his employer if the nature of the positions involves public safety, the use of or potential use of firearms, the operation of heavy equipment, care or custody of minors or other vulnerable populations, or the like.

C. Reasonable Applications to Job Applicants

The Supreme Court and Eleventh Circuit have yet to specifically rule on the constitutionality of across-the-board, suspicionless *job applicant* testing. Rather, the Court has only ruled on suspicionless testing of *current employees*. Notwithstanding, the arguments typically advanced in favor of applicant testing are the same or similar to the arguments advanced for employee testing. As such, there is a high probability that the Supreme Court and/or Eleventh Circuit would apply the same standards to applicants as it does to current employees.

Indeed, it is worth emphasizing that no case from either the Supreme Court or the Eleventh Circuit has to date endorsed an across-the-board, suspicionless drug testing requirement of all employees in the employment context, making it unlikely that the courts will do so in the context of job applicants. Rather, each decision in that context analyzes the employer's special needs in favor of testing with the privacy interests of the individuals involved on a job category by job category basis.

Additionally, although neither the Supreme Court nor the Eleventh Circuit has ruled precisely on the issue of job applicant testing, other courts have done so. In particular, two federal district court cases in Florida, relying on the Supreme Court cases referenced above, have held that across-the-board job applicant testing is unconstitutional. *Voss v. City of Key West*, 2014 WL 1883588 (S.D. Fla. May 9, 2014); *Baron v. City of Hollywood*, 93 F.Supp.2d 1337 (S.D. Fla. 2000).

In these cases, the District Court determined that the employers' general goals in maintaining a drug free workplace, minimizing on-the-job accidents, and maximizing productivity were insufficient to satisfy the special needs standard. In reaching this conclusion, the courts relied on the Supreme Court's decision in *Chandler* which rejected such generalized justifications for mandating suspicionless drug testing (as applied, in that case, to candidates for political office). As noted by the court in *Voss*, "the City's interest in the safe, effective and efficient delivery of public services is insufficient to justify the intrusion on Plaintiff's rights under the Fourth Amendment." 2014 WL 1883588, at * 5.

II. Types of Positions Where Suspicionless Testing has been Permitted

Appling the special needs analysis, courts have upheld the constitutionality of suspicionless testing in a variety of circumstances and with respect to a number of different types of positions (though, as noted above, each type of position is nonetheless subject to a case-by-case determination based on all of the specific circumstances at issue). To that end, suspicionless testing by public employers has been upheld in the following contexts:

- **Firefighters** -- *Hatley v. Dep't of the Navy*, 164 F.3d 602, 604 (Fed. Cir.1998); *Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998).

- **Police officers** -- *Carroll v. City of Westminster*, 233 F.3d 208, 213 (4th Cir. 2000); *Guiney v. Roache*, 873 F.2d 1557, 1558 (D. C. Cir. 1989); *Nat'l Fed'n of Federal Employees v. Cheney*, 884 F.2d 603, 612 (D.C. Cir. 1989); *Policemen's Benevolent Ass'n Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990).

- **Correctional employees** -- *AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993).

- **Heavy equipment operators** -- *See generally, AFSCME*, 717 F.3d at 878; *see also Middlebrooks v. Wayne County*, 521 N.W.2d 774 (Mich. 1994).

- **Paramedics/EMTs** -- *Saavedra v. City of Albuquerque*, 917 F.Supp. 760, 762 (D.N.M. 1994), *aff'd*, 73 F.3d 1525 (10th Cir. 1996); *Piroglu v. Coleman*, 25 F.3d 1098 (D.C. Cir. 1994).

- **Health care providers** -- *American Fed'n of Gov't Employees, L-2110 v. Derwinski*, 777 F.Supp. 1493, 1498-1500 (N.D. Cal. 1991) (nurses and pharmacists); *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) (physicians); *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362 (S.D. Miss. 1991) (scrub technicians).

- **Positions required to carry firearms** -- *Von Raab*, 489 U.S. 656 (1989).

- **Positions that work with drugs/controlled substances** -- *Von Raab*, 489 U.S. 656.

- **Sanitation Drivers** -- *Solid Waste Drivers Ass'n v. City of Albuquerque*, 1997 WL 280761, *3 (D.N.M. 1997).

- **Wastewater and Sewage Treatment Plant Operators** -- *Kerns v. Chalfont-New Britain Township Joint Sewage Auth.*, 2000 WL 433983, *2 (E.D. Pa. 2000), *aff'd*, 263 F.3d 61 (2001); *Geffre v. Metropolitan Council*, 174 F.Supp.2d 962, 967 (D. Minn. 2001); *Bailey v. City of Baytown*, 781 F.Supp. 1210 (S.D. Tex. 1991).

- **CDL Drivers** -- *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007); *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991); *Keaveney v. Town of Brookline*, 937 F. Supp. 975 (D. Mass. 1996).

- **Regular drivers** -- *See e.g., Boesche v. Raleigh-Durham Airport Auth.*, 432 S.E.2d 137, 141 (1993); *but see Bannister v. Board of County Comm'rs of Leavenworth County, Kans.*, 829 F.Supp. 1249, 1253 (D. Kan. 1993) (administrative employee who only occasionally drove could not be tested); *AFL-CIO v. Sullivan*, 744 F.Supp. 294, 301 (D.D.C. 1990) (employees who drove only infrequently could not be tested).

- **Mechanics** -- *English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775 (N.D. Ala. 1996) (school bus mechanic).

- **Positions which work closely with or oversee children** -- *See generally Earls*, 536 U.S. 822; *Vernonia Sch. Dist. 47J*, 515 U.S. 646; *see e.g.*, *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 368-69 (6th Cir. 1998); *Aubrey v. Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 561, 564-65 (5th Cir. 1998).

- **Positions which regularly work with classified or similar highly sensitive criminal information** -- *Hallett*, 756 F. Supp. 947 (employees who work with classified or secret information).