



Platte River
Power Authority

Legal Implications of Random Drug Testing of Employees in Public Power

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Employee Drug Testing In General

- Pre-Employment
- Random
- Reasonable Suspicion

Why Random Drug Testing?

- Maintain safety in the workplace and at the job site
- Minimize loss of productivity due to drug use
- Compliance with certain statutes (e.g. CDL or DOT regulations)
- Random testing avoids potential evasion

Potential Problems or Concerns

- Who gets tested?
 - All employees or certain classifications?
 - Ensuring that testing is not applied in a discriminatory fashion
- Reliability of results/risk of false positives
- Cost of implementing broad testing programs

Legal Considerations

- Right to Privacy
- Fourth Amendment concerns
- State law regulations

Right to Privacy

- Drug testing can reveal more than drug use –
 - Other medical conditions, like heart disease
 - Other treatments, such as anti-depressants
 - Pregnancy
- Thus, the U.S. Supreme Court has held that urine testing and blood testing implicates the right to privacy. *Skinner v. Railway Labor Exec. Assn.*, 103 L.Ed. 639 (1989)

The Fourth Amendment – What does this have to do with anything?

- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
- This applies to state action through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961)
- It is not limited to law enforcement, but applies to other coercive actions by state actors, such as mandatory drug testing for public employees. *Skinner v. Railway Labor Exec. Assn.*, 103 L.Ed. 639 (1989)

Constitutional Standards for Drug Testing Under the Fourth Amendment

- “Probable cause” has been interpreted to mean reasonable, individualized suspicion of wrongdoing by an employee. *Benevidez v. City of Albuquerque*, 101 F3d 620 (10th Cir. 1992)
- “Reasonable suspicion” requires concrete evidence, rather than hypothetical concerns about drug use. *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989)

“Special Needs” Exception to Reasonable Suspicion Requirement

- “[In] limited circumstances, where the privacy interests implicated by the search are minimal, and where 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. at 624
- This requires a balancing of “the individual’s privacy expectations against the [government’s] interests.” *National Treasury Employee’s Union v. Von Raab*, 489 U.S. 656, 665 (1989)

Meeting the “Special Needs” Test

- To meet the “special needs” test, a government employer must demonstrate:
 - (1) that drug use by the class of employees subject to random testing would pose a serious risk to public safety, and
 - (2) that the testing scheme meets the goals of detection and deterrence
- See *Chandler v. Miller*, 520 U.S. 305, 317-18 (1997)

“Special Needs” Cases

- *Skinner v. Railway Labor Exec. Assn.*, 103 L.Ed. 639 (1989) (upheld mandatory blood and urine tests of railroad employees involved in train accidents adopted in response to evidence of drug and alcohol abuse among some employees. The court noted that the intrusiveness of the test requirements was minimal, and the expectation of privacy was less in an industry highly regulated for safety)
- *National Treasury Employee’s Union v. Von Raab*, 489 U.S. 656, 665 (1989) (upheld mandatory drug tests for customs agents who would be involved in drug interdiction or would be required to carry a gun, finding compelling reasons existed to ensure that employees in these positions did not include drug users, and it was not feasible to subject these employees to day-to-day scrutiny as in a more traditional office environment)
- *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upheld a requirement of random drug testing for public high school students engaged in interscholastic competitions, noting the public interest in protecting students against drug abuse and the lesser expectation of privacy of students within the school environment)

State Law Concerns – Privacy

- No reported case has held that an employer cannot conduct random drug testing on privacy grounds
 - Generally “at will” trumps an employee’s privacy interest in this context
- However, use or disclosure of test results may give rise to claims for violation of privacy rights

State Law Concerns – Statutory Limits on Random Testing

- Many states have adopted statutes either prohibiting or limiting random drug tests
 - South Dakota (SDCL § 23-3-64) provides for testing of public employees in safety-sensitive jobs on reasonable suspicion; requires notice of drug testing policy in job postings
 - Georgia (Ga. Code. §45-23-1, §45-20-110, §34-9-410) provides for random testing of employees in “high risk” positions. Policies must be posted. Specifies conditions and methods of testing.
 - Kansas (Kan. Gen. Stat. §75-4362) allows for testing of public employees in safety-sensitive positions and certain elected officials on reasonable suspicion. Testing methods specified.

State Law Concerns – Legalized Drugs

- Employers may still conduct drug testing and discipline and terminate employees who test positive for marijuana, even in states that have legalized the use of the drug
- *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015)
 - Employee was subject to a random drug test, which revealed marijuana in his system
 - Employee asserted that he had a medical condition and was legally using marijuana
 - Employee's claim was dismissed because marijuana is illegal under federal law, even if legalized under state law

QUESTIONS?