

Random Drug Testing

Categories of Employees Subject to Testing and Best Practices

Hance Price

Staff Attorney, Frankfort Plant Board

The views herein are the author's alone and not necessarily those of FPB's Directors or management.



Random Drug Testing

- I. Categories of Employees
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Categories of Employees

- A. Safety-sensitive

- B. Department of Transportation
Commercial drivers license



Categories of Employees – Safety-Sensitive

Wenzel v. Bankhead, 351 F. Supp. 2d 1316 (N.D. Fla. 2004) contains one of the best definitions of a safety-sensitive employee.

In Wenzel, the Florida Department of Juvenile Justice maintained that all of its employees were subject to random testing. Id. at 1323.



Categories of Employees – Safety-Sensitive

- Wenzel was a strategic planner.
- He did not work with juveniles in a facility.
- He refused to take a random drug test and was fired.



Categories of Employees – Safety-Sensitive

- The court found that Mr. Wenzel was not a safety-sensitive employee.
- As such, he was not subject to random testing.



Categories of Employees – Safety-Sensitive

- The court explained:
- “The bottom line is this. In order for a state to subject an employee to random drug testing, it is not enough that there is a generalized interest in sober public employees who perform their jobs well and keep the public trust. Nor is it enough that others in the same agency have duties that make it especially important that those employees remain drug free. Nor is it enough that a far-fetched possibility can be conjured under which the employee at issue could, if under the influence of drugs, bring about some harm. . . . There must be, instead, a concrete risk of real harm.” Wenzel, 351 F. Supp. 2d at 1324-25.



Categories of Employees – Safety-Sensitive

- Another “definition” of safety-sensitive:
- Knox County Educ. Ass’n v. Knox County Bd. of Educ., 158 F.3d 361, 377 (6th Cir. 1998) explained “the test for whether employees hold safety sensitive positions is whether the employees ‘discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.’” (quoting Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 628 (1989)).



Categories of Employees – Safety-Sensitive

- Knox County discussed whether teachers and administrators held safety-sensitive positions.
- The court said that teachers did not “fit neatly into the prototypical ‘safety-sensitive’ position, [but the court did] not read the definition of ‘safety-sensitive’ so narrowly as to preclude application to [teachers and school administrators].” Id. at 378.



Categories of Employees – Safety-Sensitive

- The court said “[s]imple common sense and experience with life” supported the determination that teachers and school administrators held safety-sensitive positions. Id. at 378.



Categories of Employees – Safety-Sensitive

- The Board of Education did not cite any examples of harm to students because of impaired teachers.
- However, the Sixth Circuit found that was unnecessary. Id. at 379.



Categories of Employees – Safety-Sensitive

- The court explained that the Board was not required to “wait passively for a disaster to occur before taking preemptive action to minimize the risks of . . . an occurrence.” Id. at 379.
- This is because the community would question why the Board did not act in advance if an accident happened because of an impaired employee. Id. at 379.



Categories of Employees – Safety-Sensitive

- Applying the definitions in order to determine what positions are subject to random testing is an exercise in balancing the risk of testing an employee improperly versus explaining to your Board or community why there was an accident because of an impaired employee.
- Explaining not only to the governing body, but also to other employees that might be exposed to harm.
- Communicating that testing protects employees could perhaps minimize complaints.



Categories of Employees – Safety-Sensitive

- Make certain job descriptions accurately reflect the tasks performed.
- For instance, if the job description says the employee operates a backhoe make sure that is the case.



Categories of Employees – Safety-Sensitive

- Examples:
- Employees who occasionally drive to meetings, no company vehicle provided, no other “safety-sensitive” tasks.
- Subject to random testing?



Categories of Employees – Safety-Sensitive

- No, Bannister v. Leavenworth County, 829 F. Supp. 1249, 1253 (D. Kan. 1993).
- If the employee drives a private vehicle and there is no other safety-sensitive aspect to the job, then random testing is not appropriate.



Categories of Employees – Safety-Sensitive

- How about those employees who are provided company vehicles?



Categories of Employees – Safety-Sensitive

- Yes, Am. Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 744 F. Supp. 294, 300 (D.D.C. 1990).
- Justified on the basis of harm to passengers.



Categories of Employees – Safety-Sensitive

- Dispatchers?



Categories of Employees – Safety-Sensitive

- Yes, provided they are responsible for dispatching help in an emergency.
- Gonzalez v. Metro. Transp. Auth., 73 Fed. Appx. 986 (9th Cir. 2003).
- The court noted it did not matter that the employee performed the job's safety-sensitive aspect infrequently. Id. at 989.



Categories of Employees - DOT

- Much less uncertainty.
- Employees holding a commercial drivers license are subject to random drug testing.
- 49 C.F.R. § 382.103(a) (2017).



Categories of Employees - DOT

- A CDL is required if (among other reasons):
 - The vehicle weighs more than 26,001 pounds.

49 C.F.R. § 382.107 (2017).



Selection Process – Random Testing

- 49 C.F.R. § 382.305 outlines random testing requirements.
- The minimum annual percentage rate for random drug testing is currently 25% of the average number of driver positions. 49 C.F.R. § 382.305(b)(2) (2017).
- This rate may change. It is adjusted based on reported violation rates. 49 C.F.R. § 382.305(f) (2017).



Selection Process – Random Testing

- Current random testing rates are available at:
 - Current Random Testing Rates, 2017 DOT Random Testing Rates, <https://www.transportation.gov/odapc/random-testing-rates> (last visited July 20, 2017).



Selection Process – Random Testing

- “DOT and non-DOT random testing pools must be completely separate.”
 - U.S. Dept. of Transp. Office of the Secretary, Office of Drug and Alcohol Policy and Compliance, Best Practices for DOT Random Drug and Alcohol Testing 2, https://www.transportation.gov/sites/dot.gov/files/docs/ODAPC_Random%20Testing%20Brochure.pdf (last visited July 20, 2017).



Selection Process – Random Testing

- The selection process must be truly random.
- “The selection of drivers . . . shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers’ Social Security numbers, payroll identification numbers, or other comparable identifying numbers.” 49 C.F.R. § 382.305(i)(1) (2017).
- May use a third party administrator to make selections. 49 C.F.R. § 382.305(j)(2) (2017).



Selection Process – Random Testing

- Test at least quarterly.
- U.S. Dept. of Transp. Office of the Secretary, Office of Drug and Alcohol Policy and Compliance, Best Practices for DOT Random Drug and Alcohol Testing 3-4, https://www.transportation.gov/sites/dot.gov/files/docs/ODAPC_Random%20Testing%20Brochure.pdf (last visited July 20, 2017).



Best Practices – Random Testing

- Random testing, or any testing program, should be “circumscribed, narrowly-tailored, and not overly intrusive, either in its monitoring procedures or in its disclosure requirements.” Knox County Educ. Ass’n v. Knox County Bd. of Educ., 158 F.3d 361, 384 (6th Cir. 1998).
- The Knox County program did not have a random component and so was even less intrusive. Id.
- The manner of testing can affect whether testing is constitutional.
- Follow DOT guidelines.



Best Practices – Manner of Testing

- 49 C.F.R. § 382.105 (2017) notes that testing procedures are contained in 49 C.F.R. Part 40. For instance:
 - An employer may use a third-party to conduct testing. 49 C.F.R. § 40.15 (2017).
 - What drugs are tested for. 49 C.F.R. § 40.85 (2017).
 - Medical Review Officer qualifications. 49 C.F.R. § 40.121 (2017).



Best Practices – Manner of Testing

- Requirements for specimen collection set forth at 49 C.F.R. Part 40 Subpart E.
- Collection site (third-party) should follow these procedures.
- Procedures for employer to monitor the collection site contained in:
 - U.S. Dept. of Transp. Office of the Secretary, Office of Drug and Alcohol Policy and Compliance, What Employers Need To Know About Monitoring Collection Sites, https://www.transportation.gov/sites/dot.gov/files/docs/Employer_Collection_Site_Audit_Brochure_1.pdf (last visited July 20, 2017).



Best Practices – Types of Substances

- 49 C.F.R. § 40.85 (2017) lists five drugs: marijuana, cocaine, amphetamines, opiates and PCP.
- Cannot test the “DOT sample” for any other drugs. Id.



Best Practices – Medical Officer Review

- Use of a medical review officer protects employee privacy and the testing program from potential challenges.
- MRO requirements contained in 49 C.F.R. Part 40 Subpart G.



Best Practices – Records Retention

- Records retention requirements for testing are outlined in 49 C.F.R. § 382.401 (2017).
- Discusses what records to keep and how long to keep them.
- MRO may maintain records on the employer's behalf. U.S. Dept. of Transp. Office of the Secretary, Office of Drug and Alcohol Policy and Compliance, Employer Record Keeping Requirements For Drug & Alcohol Testing Information, 2
<https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC%20Recordkeeping%20Requirements.pdf> (last visited July 20, 2017).
- Retention times range from one year (for negative test results) to indefinitely (for training records).



QUESTIONS?

THANK YOU