



Safety versus Privacy:

When May a Public Employer Require a Drug Test?

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Few personnel policies are as eagerly embraced by employers as drug-testing policies, but for public employers, few are as fraught with constitutional issues. Imagine that you are a human resources director. Your manager tells you that the governing board wants him to draft a drug-testing policy and he needs your help. Can the board require all employees to undergo random drug testing, he asks? If not, what is the standard for determining who may be required to do so? Can the board test for off-duty drug use? And shouldn't the policy include alcohol as well? This article reviews the law governing the random testing of public employees for the use of drugs and alcohol, discusses current law regarding other bases for substance-abuse testing, and suggests ways for public employers to develop policies that will withstand legal challenges.

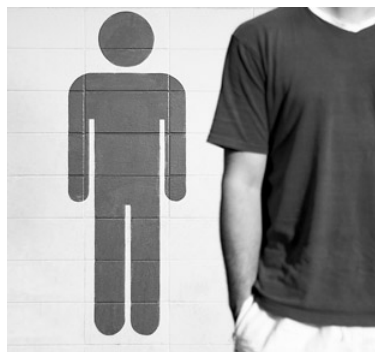
Basic Rules

Three basic rules govern drug testing of public employees. First, a public employer may engage in random drug testing only of employees in safety-sensitive positions. It may not require employees whose primary duties are not likely to endanger the public or other employees to submit to random drug testing. Second, a public employer may ask *any* employee—in a safety-sensitive position or not—to take a drug test if it has a reasonable, individualized suspicion that the employee is using illegal drugs. Third, a public employer may, the law seems to say, require applicants for employment to submit to drug testing as part of the application process.

The rules regarding drug testing are not nearly as strict for private employers. They may test whenever they want unless a contract or a collective bargaining agreement restricts them. Why the distinction? Because the Fourth Amendment to the U.S. Constitution, which protects people from unreasonable searches and seizures, applies to public employers but not private employers.¹ The Supreme Court has held that urinalysis (the most commonly used method of drug testing)—or any other forced collection of bodily fluids or breath samples—is a search within the meaning of the Fourth Amendment.² And what the government may not do in the context of its police power, it may not do as an employer.³

Special Needs of Public Employers

This means that a public employer's drug-testing policy must meet the Fourth Amendment's requirement that it be reasonable. In most criminal cases, police searches must be authorized by a warrant issued on probable cause to be considered reasonable and thus legal. The Supreme Court has recognized,



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however, that governments have special needs or interests that arise outside the context of regular law enforcement—for example, governmental employment. In such a context, warrant and probable cause requirements are simply not practical.⁴ Rather, the test of the reasonableness of a practice, or search, is whether the intrusion on the individual's Fourth Amendment privacy interests is outweighed by the legitimate government interests that the practice

further.⁵ When the special interest is compelling and the intrusion minimal, a public employer may engage in random drug testing not only without a warrant or probable cause but also without any individualized suspicion.⁶

The Supreme Court has analyzed the special needs exception for drug testing of public employees in three cases: *Skinner v. Railway Labor Executives' Association*, *National Treasury Employees Union v. Von Raab*, and *Chandler v. Miller*.

In *Skinner* the Court held that Federal Railroad Administration regula-

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tions requiring blood and urine tests for railway workers following certain types of train accidents, whether or not reasonable suspicion was present, were constitutional because their value in promoting public safety outweighed their intrusion into employees' privacy.⁷

In *Von Raab* the Court upheld as constitutional a U.S. Customs Service requirement that employees seeking promotion to certain positions involved in halting the flow of illegal drugs undergo drug testing, even in the absence of individualized suspicion. The Court found three compelling government interests: maintaining the integrity of the Customs Service workforce, protecting the public from public employees carrying firearms, and regulating the types of people with access to classified information.⁸ Indeed, the government's interest in ensuring that personnel working on the front lines of the drug war were of unimpeachable integrity was by itself sufficiently compelling to outweigh the privacy interests of the employees involved. Employees engaged in drug control efforts are routinely exposed to organized crime and illegal drug use, have access to contraband, and are the targets of bribery by drug smugglers and dealers to a far greater extent than other employees.⁹

Finally, in *Chandler* the Court held that a Georgia law requiring all candidates for state office to pass a drug test was unconstitutional. The state presented no evidence that drug use among public officials was widespread, and made no showing that public safety was in jeopardy. The Court found that, in contrast to the needs of the Customs Service in *Von Raab*, Georgia's interest in ensuring that its public officials were not drug users was merely symbolic of its commitment to ending drug abuse, rather than special within the meaning of the exception to the warrant requirement of the Fourth Amendment.¹⁰

Development of a Drug-Testing Policy
Neither *Skinner*, *Von Raab*, nor *Chandler* sets forth a rule by which constitutional drug-testing policies can be easily distinguished from unconstitutional policies. So how can a public employer develop a legal but workable drug-

testing policy? By keeping in mind the general principles that emerge from *Skinner*, *Von Raab*, *Chandler*, and the lower court decisions that have followed them.

First and most important, each decision to require an employee to undergo drug testing (random or otherwise) is subject to the Fourth Amendment balancing test. That test asks: what government interest is served by requiring drug testing under these circumstances, and is that interest so compelling as to outweigh the intrusion that drug testing imposes on the privacy interests of the employee holding the position?

Second, the courts have generally found that urine and blood tests pose a minimal invasion of employees' privacy interests, given the widespread use of such tests in regular medical examinations. This is especially true when a urine sample is collected in conditions approximating those people routinely encounter at a doctor's office: in an enclosed bathroom where others can neither see nor hear the act of urination. When employees must urinate in the presence of a monitor, the intrusion is more substantial but generally still not enough to tip the balance in favor of privacy when the government's interest is otherwise compelling.¹¹

In addition, because certain industries and professions already are extensively regulated for safety purposes, some employees start with a diminished expectation of privacy. For example,

as a condition of employment, law enforcement officers typically agree to take medical examinations, consent to criminal background and credit checks, and authorize the employing agency to see otherwise confidential information. The courts have therefore held, without exception, that such employees have a diminished expectation of privacy.¹²

Third, and on the other side of the balancing test, courts almost always find that protection of the public from immediate threats to its safety is a compelling government interest that outweighs any intrusion on employees' privacy, whatever the type of drug testing involved. In fact, for most public employers, the potential threat to either public safety or the safety of other employees is likely the *only* interest that will justify a random drug-testing program. The cases make clear that a government's general interest in maintaining the integrity of its workforce is not a sufficiently compelling interest to justify random drug testing of its entire workforce. Only when employees are actually involved in enforcement of drug laws is the

government's interest in workforce integrity compelling enough to outweigh privacy interests.¹³

Finally, no matter how compelling a government's interest, random drug testing is permissible only if the employer gives employees general notice, preferably at the start of their employment, that they are subject to the testing requirement.¹⁴ A newly adopted drug-testing



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policy may apply to old and new employees alike. The employer must simply give affected employees—current and incoming—notice and an explanation of the random drug-testing policy before the first employee is called in for a test.

Random Drug Testing

Testing of Employees in Safety-Sensitive Positions

Given that random drug testing of public employees is illegal in the absence of an immediate threat to public safety, for most public employers, identifying positions that may legitimately be deemed safety-sensitive is one of the most critical parts of developing a drug-testing policy. What makes a position safety-sensitive? In short, the specific job duties assigned to that position.

When asked to decide whether a particular position is safety-sensitive, the courts focus on the immediacy of the threat posed by a potential drug-induced mistake or failure in the performance of specific job duties. As the Supreme

Court expressed it, a safety-sensitive position is one in which the duties involve “such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences.”¹⁵ Or, as a lower court said, “The point . . . [is] that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before harm occurs.”¹⁶

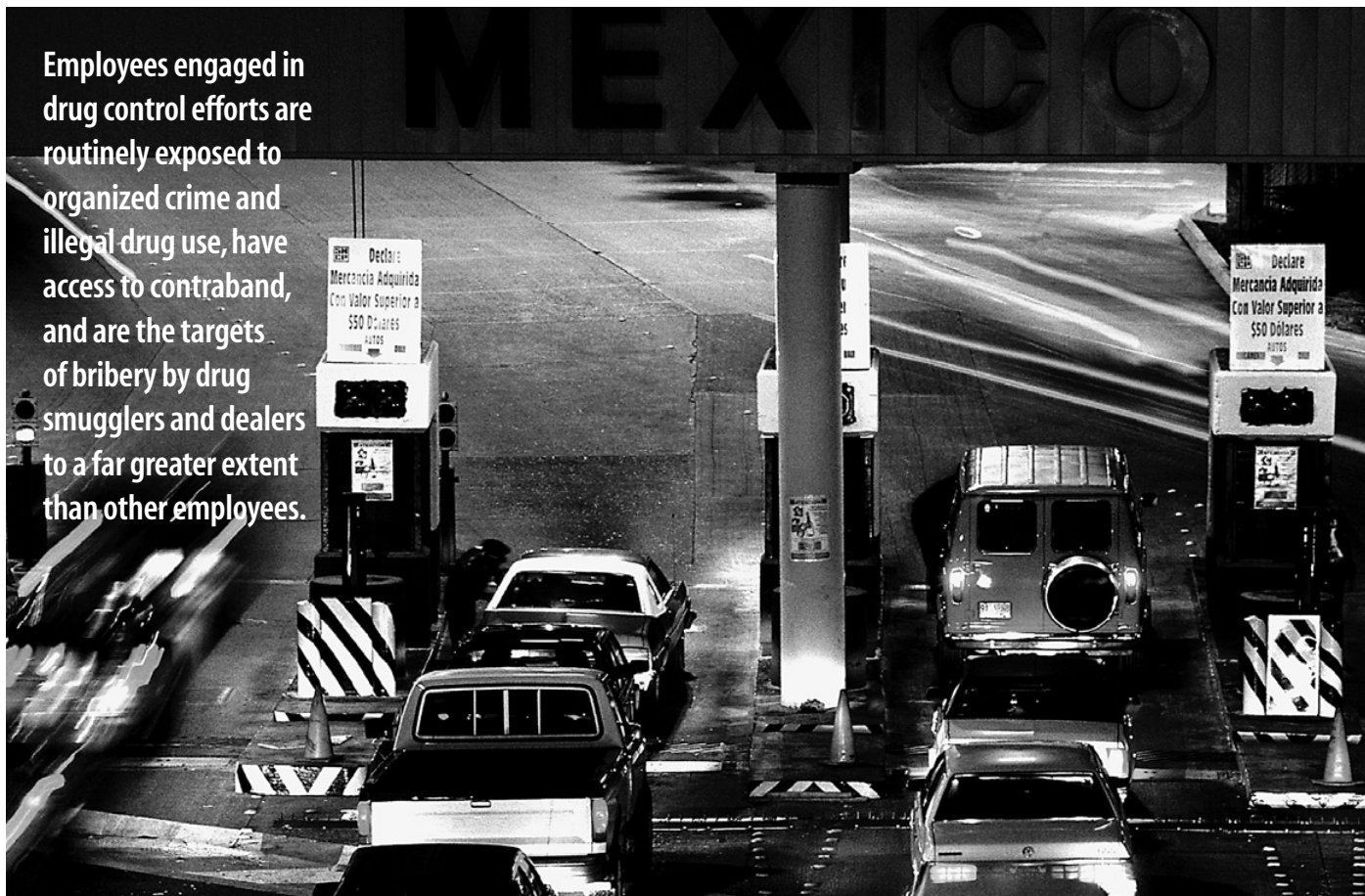
There is no dispute about whether an error by an armed officer could result in the death or the injury of another. Hence the courts have considered armed law enforcement officers safety-sensitive positions,¹⁷ as they have firefighters;¹⁸ emergency medical technicians;¹⁹ other health care professionals responsible for direct patient care;²⁰ people who operate, repair, and maintain passenger-carrying motor vehicles;²¹ drivers of sanitation trucks;²² and employees with access to chemical weapons and their components.²³

Identifying a position's implications for public safety is not always so easy, however. What about a 911 dispatcher, for example? If this position is responsible for relaying directions and other preparatory information to first responders, a mistake could result in a delay that costs people their lives. So the position would likely be considered safety-sensitive.

A bus dispatcher, then? A police department receptionist? A police department desk sergeant? Although a bus dispatcher whose performance is impaired might give incorrect information to a driver, possibly leading to a delay, in the ordinary course of events, an immediate threat to public safety is unlikely. Each position in each jurisdiction is unique, however. The decision not to classify the position of bus dispatcher as safety-sensitive might well change if the duties included, for example, emergency management and evacuation responsibilities.²⁴

As for the police department receptionist and desk sergeant, the mere fact that an employer is a law enforcement

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agency does not render all its positions safety-sensitive. A law enforcement agency could not legitimately include in a random drug-testing program a receptionist who simply greeted visitors and transferred telephone calls or a law enforcement officer whose duties were all administrative, unless the officer was expected to carry a gun.

The threat posed by an employee's drug-impaired performance does not have to be a threat to individual safety for the government's interest to be compelling. A threat to public health generally or to the environment can justify random drug testing. Employees of sewage and wastewater treatment plants also may occupy safety-sensitive positions. Sewage disposal is heavily regulated by both state and federal environmental protection agencies, precisely because of the harm that sewage spills can cause. In addition, depending on the position, wastewater treatment plant employees may regularly use hazardous chemicals and equipment that pose great danger, and may have responsibility for responding to emergency situations.²⁵

Driving as a Safety-Sensitive Activity

For many public employees, driving is a regular part of the workday. For some it is a primary duty, as with bus, sanitation truck, or ambulance drivers. For others it is a means of carrying out their primary duties, as with a visiting nurse employed by a health department or a traveling caseworker for the department of social services. Still others drive on an occasional basis—for example, when a deadline makes dropping something off more efficient than mailing it, or when employees cannot wait to reorder a needed supply that runs low.

May all these categories of "driving employees" be required to undergo random drug testing? The courts have said no.

In determining whether an employee who drives on the job is in a safety-sensitive position, the test is not merely whether the employee's primary job duty is to drive, but whether performance of the employee's job duties requires driving on a regular basis, as compared with a position in which an employee might on occasion decide or be asked to drive.²⁶

A comparison of two cases helps illustrate the difference. In the first case (one of the few reported North Carolina cases to consider safety-sensitive positions), the court held that a ventilation system mechanic employed by an airport authority held a safety-sensitive position because to access the terminals' heating and cooling equipment, he regularly had to drive a vehicle on the flight area apron near jetliners.²⁷

In contrast, in the second case, the court found that secretary to the Leavenworth County, Kansas Commission on Aging was not a safety-sensitive position. The secretary's duties were primarily clerical, but occasionally she drove a car to deliver meals-on-wheels to senior citizens when regularly scheduled volunteers did not show up. Because of this occasional on-duty driving, the county classified her position as safety-sensitive and required her to submit to random drug testing. The court, however, held that "when the employee's duties require driving, such as the duties of one who patrols or makes pick-ups, that employee's position is safety-sensitive. When driving

is only incidental to other duties that engage no safety concern, the employee's position is not safety-sensitive."²⁸

To return to the examples set forth earlier, because of the role that driving plays in the performance of their duties, bus driver, sanitation truck driver, and ambulance driver may be considered safety-sensitive positions and included in a random drug-testing program. So may the human services employees who drive vehicles to reach their clients. But the employee who drives occasionally, whether to fill in, in a pinch, or to pick up something urgently needed, may not be required to submit to random drug testing in the absence of individualized, reasonable suspicion that he or she has been using illegal drugs.

Custodians, Technicians, and Repairmen

The law is much less clear when it comes to employees who use and service equipment and systems. Consider a transportation system custodian, whose regular job duties include cleaning transit-stop locations, facilities, and equipment; painting facilities and equipment; cleaning vehicles; and removing trash and debris. One court found that the position was not safety-sensitive because it did not involve an unusual degree of danger to the employee or others.²⁹ Another court, however, found that elementary school janitor was a safety-sensitive position because (1) the janitor handled potentially dangerous machinery such as lawn mowers and tree-trimming equipment, and hazardous substances like cleaning fluids, in an environment that included a large number of children between the ages of three and eleven, and (2) the presence of someone using illegal drugs could increase the likelihood that the children might obtain access to drugs.³⁰ The distinguishing factor in the second example was the presence of young children, which some courts see as transforming jobs that are otherwise not fraught with risk and danger into bona fide safety-sensitive positions.³¹

Some positions whose duties do pose safety risks may nonetheless be deemed *not* to be safety-sensitive because the personal conduct of the employees and their job performance are subject to day-to-day scrutiny by supervisors and

co-workers, who are likely to notice any impairment. In one case a federal district court found that elevator mechanics working for a transit authority were in safety-sensitive positions, not simply because elevators might fail, but also because the mechanics were subject to little supervision on the job. On the other hand, carpenters, masons, ironworkers, plumbers, and painters working for the transit authority were not in safety-sensitive positions because they either worked in pairs or were subject to direct supervision.³²

Drug Testing Based on Reasonable Suspicion

Drug testing based on a suspicion that a particular public employee is using illegal drugs also is considered a Fourth Amendment search. Like random drug testing, drug testing based on reasonable suspicion is subject to the Fourth Amendment balancing test that weighs the government's interest against the employee's. Testing based on reasonable suspicion is considered less intrusive than random testing because the employee's own action or conduct triggers it.³³

Reasonable suspicion is determined case by case. The courts agree that it takes less for an employer to meet the standard of reasonable suspicion than it does for police to show probable cause for a criminal search warrant. Yet reasonable suspicion must amount to more than a hunch. Supervisors must point to specific, objective facts and be able to articulate rational inferences

drawn from those facts in light of their experience.³⁴

An employer does not need a formal policy defining reasonable suspicion before it can test employees on that basis, but a written policy can be useful. By making known its criteria for finding reasonable suspicion, an employer gives

employees fair notice of the circumstances in which they will be required to submit to a drug test. It also provides guidance to supervisors who are confronted with the possibility that an employee is using drugs and are uncertain whether they should require the employee to submit to a drug test. Giving guidance to supervisors, in turn, helps ensure uniform administration of the drug-testing program.

For all these reasons, a policy that sets forth the circumstances under which supervisors can require drug testing also increases the chances that a court will uphold a drug test as reasonable if the employee challenges it. Criteria that the courts have found constitutional include the following:

- Direct observation of drug use or possession.
- Direct observation of the physical symptoms of being under the influence of a drug, such as impairment of motor functions or speech.
- 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



A parent called the school system to complain that her child's school bus had arrived late and that when the bus doors opened, she smelled marijuana. The mother identified both herself and her child. The school system reported the mother's complaint to the driver and asked him to take a drug test. Not once did the driver suggest that there was any reason to doubt the mother's reliability. The court ultimately held that the drug test did not violate the Fourth Amendment, given the nature of the driver's job, but noted that it was a close case.

criminal investigation into illegal drug possession, use, or distribution.

- Information that is provided by reliable and credible sources or that can be independently corroborated.
- Newly discovered evidence that the employee tampered with a previous drug test.³⁵

Some courts have found the third criterion just listed to be too broadly worded and to invest too much discretion in an individual supervisor's judgment to make drug testing reasonable.³⁶ But drawing up a comprehensive list of abnormal behavior that would justify drug testing is not practical. What is "abnormal" or "erratic" in one individual or one situation may be quite normal in another. Some employers have dealt with this problem by requiring that any observation of erratic or unusual behavior be made by a supervisor (or sometimes by two supervisors) trained to recognize the signs of drug use.³⁷

The Problem of the Tip

A difficult situation arises when someone other than a trained supervisor reports possible drug use. Three cases illustrate the difficulty of evaluating such reports and the importance of corroborating evidence. In the first case, a public hospital employee, R., noticed a cut straw with some white powdery residue at the tip in the chart room. Two coworkers, A. and B., also were in the room. When R. returned to the room a short time later, the straw was gone. R. could not identify the powdery residue, had no training in identifying drug use or even in identifying medicines, and

later admitted that she could not tell the difference between cocaine and powdered milk. R. nevertheless re-

ported to her supervisor that she suspected A. and B. of using illegal drugs. No other employee had reported that he or she suspected drug use by

A. and B., and no one had observed any erratic behavior or performance problems on their part. The chart room was an all-purpose room in which food was sometimes stored and employees sometimes used straws to mix patients' medications. Nevertheless, the hospital asked A. and B. to submit to a strip search. The search turned up no evidence of drug use. R., however, had a reputation for honesty, so hospital management told A. and B. that pursuant to its drug-free workplace policy, they would have to submit to a drug test. When they refused, they

were dismissed.

The North Carolina Court of Appeals overturned the dismissal. There was nothing wrong with the hospital's drug-free workplace policy on its face, the court said, but the hospital had not satisfied any of the criteria set forth in the policy for finding reasonable suspicion. The hospital had demanded that A. and B. take a drug test solely on the basis of another employee's hunch, not on the basis of specific facts.³⁸

In the second case, a chief of police received a phone call from a man who claimed that he had known C., one of the city's police officers, for twelve years and had seen him coming off a heroin high the previous day. The caller said that was why C. had called in sick that day (and indeed he had). This was not

an anonymous tip: the caller gave his name and phone number. The chief had previously received an anonymous tip that C. had been seen at a known drug bazaar, but had decided not to investigate the allegation without more evidence. This time the city administered a drug test to C., which he failed. The city terminated C. The court held that the city had reasonable suspicion, so the drug test was legal, as was C.'s termination for illegal drug use.³⁹

In the third case, a parent called the school system to complain that her child's school bus had arrived late and that when the bus doors opened, she smelled marijuana. The mother identified both herself and her child. The school system reported the mother's complaint to the driver and asked him to take a drug test. Not once did the driver suggest that there was any reason to doubt the mother's reliability. The court ultimately held that the drug test did not violate the Fourth Amendment, given the nature of the driver's job, but noted that it was a close case.⁴⁰

As these three cases show, an employer must evaluate both the nature of a report of drug use or suspicious behavior, and the reliability of the informant. Is the report based on personal observation or on inference? Does the informant have any training in recognizing the signs of drug use? In general, the more detailed the tip, the greater its credibility for Fourth Amendment purposes. When the information is less detailed, corroboration can give it greater credibility.

In the first case, R.'s information was not very detailed: she saw an unidentified white powder in a hospital setting, but she did not see A. or B. handle the powder or otherwise engage in questionable activity. No one else reported anything out of the ordinary about A.'s and B.'s behavior. R. had a reputation for honesty, but the problem was not that what she reported was untrue. Rather, R. and hospital management made unwarranted inferences from facts that could lend themselves to a variety of interpretations. For example, the straw may have been used to mix a medication or to stir creamer into coffee.

In the second case, in contrast, the tipster said he had seen C. take heroin and



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knew things about C. that tended to corroborate his claim. In addition, an earlier report had attributed drug use to C.

As for the reliability of the informants, in both the second and the third case, the informants said who they were and where they could be reached for further questioning. In neither case was there any evidence suggesting that the informant had an ulterior motive in making the report or was otherwise not likely to be credible.

On-Duty versus Off-Duty Use of Drugs

A public employer always may require its employees to submit to a drug test when it reasonably suspects drug use on duty. When an employee's duties involve public safety or welfare, the courts usually will find that the government has a compelling interest in having that employee refrain from narcotics use while off duty, because the impairment caused by earlier drug use may continue even after the employee has returned to work and may not be noticed until after an accident or an injury occurs.

Therefore an employer is not required to demonstrate that the job performance of an employee in a safety-sensitive position is impaired in order to require a drug test based on reasonable suspicion of off-duty drug use.

Testing other employees based on a suspicion of off-duty drug use is another matter. Employees who do not hold safety-sensitive positions may be tested for use of illegal drugs only if there is reasonable suspicion of on-duty use or impairment. Why the different standard? Because outside a law enforcement context, the government's legitimate interest in whether its employees are using drugs extends no further than its interest in their workplace conduct and their performance of job duties.⁴¹

This limitation on a public employer's ability to require drug testing applies equally to "at-will employees" (those who can be fired for any reason or no reason) and to "employees with property rights in their employment" (those who are protected by a statute or an ordinance limiting their termination to circumstances in which there is just cause).

Testing after an Accident or an Unsafe Practice

Many jurisdictions make drug testing mandatory after an on-the-job accident or an "unsafe practice" (a practice that endangers the employee or others). Others include accidents among the criteria on which reasonable suspicion may be based. This certainly seems reasonable in the ordinary sense of the word, but is it legal? As with most other aspects of drug testing, the answer is that it depends on whether the personnel involved are in safety-sensitive positions.

The reasons for requiring post-accident or unsafe-practice testing for employees in safety-sensitive positions are several. First, such a requirement has a great deterrent effect. As the Supreme Court put it in *Skinner*,

[B]y ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly

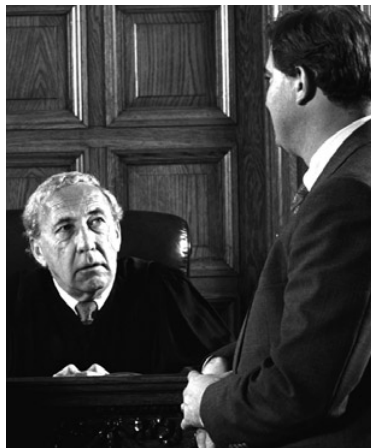
*increase the deterrent effect of the administrative penalties associated with the prohibited conduct, . . . [while] increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.*⁴²

Second, *positive* test results may suggest to investigators that drug impairment caused the accident, contributed to the severity of the injuries, or caused a delay in obtaining help for the injured.

Conversely, *negative* test results may allow investigators to rule out drug use as a cause. In most cases, discovering whether drug impairment may have been a cause is only possible by conducting a drug test soon after the accident.⁴³

In *Skinner*, where the specific issue before the Supreme Court was the constitutionality of post-accident testing of railway employees, the Court concluded that the government's interest in preventing train accidents and identifying their causes was compelling and would be hindered by a requirement that the railroad have individualized reasonable suspicion with respect to the employees involved.⁴⁴ Train accidents pose the threat of injury and damage on a large scale. Drafting a post-accident testing policy for a railroad is therefore easier than drafting one for a local government employer or a state agency, because state and local government employees may be involved not only in serious accidents but in minor fender-benders that do not result in personal injury or in major property damage. In the case of other types of public employees, the lower courts have generally found post-accident testing reasonable when immediate and significant threats to public

safety are involved. But they have not found policies requiring testing of all employees after an accident or an unsafe



The government argued that because studies had shown drug users to have higher rates of absenteeism and dismissal than other employees, its mandatory pre-employment drug-screening program served a compelling government need.

practice to be constitutional because not all employees have a diminished expectation of privacy—an employee whose driving is incidental to his or her primary duties, for example—and because such policies are not responsive to an identified problem in drug use.⁴⁵ The policies are both underinclusive (because only people involved in accidents in the course of employment are to be tested) and overinclusive (because all people involved in accidents are tested, not just people injured under circumstances suggesting their fault).⁴⁶

Suppose that a drug-testing policy provides for testing

employees after every accident in which there is property damage of more than \$1,000. A car driven by a county driver (a safety-sensitive position) is hit from behind at a red light, and repair obviously will cost more than \$1,000. The police are called to make an accident report. The county driver clearly was not at fault. The other driver acknowledges that it was his mistake. Under these circumstances a court would be unlikely to find a compelling government interest in drug-testing the county employee that outweighs the employee's privacy interest.

Post-accident and unsafe-practice testing is subject to the Fourth Amendment balancing test. A good policy of this kind therefore should indicate the magnitude of personal injury or property damage that is sufficient to trigger a drug test. In general, for post-accident and unsafe-practice testing to be reasonable, the lower the threshold for triggering a test, the more safety-sensitive

the position covered by the policy must be.⁴⁷ Courts have found, for example, that a policy calling for the testing of *any* employee in any accident involving \$1,000 of damage is too broad.

The policy also should define its terms: Do “accidents” include dropping computers or other valuable items on the employer's premises, or are they limited to incidents involving motor vehicles? Are accidents in which fault lies with the other party included? Does the term “personal injury” mean any personal injury? Courts have generally found that policies providing for testing whenever an accident has caused a personal injury are too broad to be reasonable. On the other hand, they have found reasonable a policy calling for testing when there is “an injury demanding medical treatment away from the scene of an accident,”⁴⁸ and a policy requiring testing when there has been a personal injury requiring immediate medical attention.⁴⁹

Likewise, it is advisable to put a dollar value on the amount of property damage that will trigger the need for a drug test. Using terms like “major” or “minor” accident leaves too much discretion to individual supervisors in deciding whether testing is reasonable.⁵⁰

Testing of Job Applicants

May a North Carolina public employer require pre-employment drug testing of all applicants? The answer is unclear. Neither the U.S. Court of Appeals for the Fourth Circuit (the federal appeals court whose jurisdiction includes North Carolina) nor the North Carolina appellate courts have addressed this issue. Like every aspect of drug testing, the question is subject to the Fourth Amendment balancing test with respect to each position: is the government's need to conduct drug testing of a person in this position, under these circumstances, so compelling that it outweighs the individual's privacy interests?

It can be argued that mandatory drug testing of all applicants for government positions does not violate the Fourth Amendment. First, the privacy interests of applicants are not as great as those of current employees. Applicants have



Health care workers in public hospitals are subject to drug testing on the basis of reasonable suspicion that they are using drugs.

control over whether or not they will be subject to drug testing in that nothing compels them to apply for a job in the public sector. Instead, the obligation to undergo a drug test is triggered by the applicant's desire for a government job. This, several courts have noted, is very different from the position in which current government employees find themselves when a drug-testing policy is first adopted or an existing policy is newly applied to them: they must submit to the drug test or lose their jobs.⁵¹

Second, many state and local public employers require applicants to authorize a criminal or general background check before they

can be considered for a position. This also diminishes applicants' expectations of privacy.⁵²

Third, at the applicant stage, drug testing almost always is conducted under conditions similar to those found at the doctor's office.⁵³ Courts acknowledge that even under such conditions, mandatory urinalysis is an invasion of privacy, but they consider the intrusion to be minimal.

Public employers should keep in mind, however, that many of the cases in which courts have approved of mandatory drug testing of *all* applicants for government positions have been ones in which the named plaintiffs have

been applicants for safety-sensitive positions (or for positions relating to national security, not relevant here).⁵⁴ In a case involving an attorney applicant for a non-safety-sensitive position in the U.S. Department of Justice's Antitrust Division, the government argued that because studies had shown drug users to have higher rates of absenteeism and dismissal than other employees, its mandatory pre-employment drug-screening program served a compelling government need. The federal appeals court for the District of Columbia agreed.⁵⁵

However, the court's conclusion is not uniformly shared. Other courts have focused more narrowly on the relationship between the duties of individual positions and the potential harm that could result from drug use by a person in a given position. A federal court found Georgia's Applicant Drug Screening Act to be unconstitutional. The act required *all* applicants for state employment to submit to a drug test. When challenged, the state cited as its compelling interest its general desire to maintain a drug-free workplace. This interest, the court held,



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was not enough to tip the balance in favor of drug testing.⁵⁶

Another federal court rejected a Florida city's claim that the need for public confidence in municipal government justified a mandatory pre-employment drug-testing policy that applied to all applicants for all positions without regard to the particular job duties involved and without distinguishing between positions that were safety-sensitive and those that were not.⁵⁷ Both the Georgia court and the Florida court noted that the intrusions on applicants' privacy were minimal but found the employees' privacy interests to be stronger than the government's concern with the public perception of its workforce.

The U.S. Supreme Court has never directly addressed this issue. *Von Raab* and *Chandler*, however, imply that mandatory pre-employment drug testing of all applicants would be unconstitutional. In *Von Raab* the Supreme Court pointedly distinguished between employees involved in drug control—who should expect an inquiry into personal information—and “government employees in general.” In *Chandler*, in overturning the Georgia law that required all candidates for public office to undergo a drug test, the Court again stressed the unique circumstances of front-line drug interdiction that made the mandatory drug testing in *Von Raab* reasonable for Fourth Amendment purposes: “customs workers, *more than any other Federal workers*, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use.”⁵⁸ But these are only observations that the Court made in explaining its holdings and are not considered “law.”

In the absence of controlling law from the Supreme Court, the Fourth Circuit Court of Appeals, or North Carolina state courts, it is unclear whether North Carolina public employers may require all applicants to undergo pre-employment drug testing. The constitutionality of such a practice is an open question, and North Carolina public employers should periodically review their drug-testing policies with their attorneys to make sure that the policies remain within the bounds of any changes in the law.

Alcohol Testing

Drug and alcohol testing have identical purposes: to prevent, to the extent possible, the accidents, injuries, mistakes, and general poor performance attributable to impaired employees. But drug and alcohol testing differ in one important respect: alcohol testing is significantly limited by the Americans with Disabilities Act (ADA), whereas drug testing is not. The ADA prohibits discrimination in employment based on disability.⁵⁹ Under the ADA, alcoholism is considered a disability, but current illegal drug addiction is not.⁶⁰ The ADA does not allow employers either to ask applicants any questions designed to uncover a disability or to require applicants to undergo any sort of medical examination (such as a blood test) before a conditional offer of employment has been extended.⁶¹

For that reason an employer may ask an applicant to take a pre-employment drug test without violating the ADA but may not require a pre-employment alcohol test.

Once a conditional offer of employment has been made, an employer may require the successful applicant to have a medical examination, which may include a blood test for the presence of alcohol. However, any decision to withdraw an offer on the basis of the results of the medical examination must be job related and consistent with business necessity.⁶² An employer may withdraw a conditional offer because of conduct-based reasons, such as the applicant's showing up for a pre-employment physical examination under the influence of alcohol, but not because it suspects that the applicant is an alcoholic.⁶³

Once an applicant becomes an employee, an alcohol test may be required only if the employer has reasonable suspicion that the employee has reported to work while under the influence

of alcohol, in violation of established workplace policy.⁶⁴ An employer may require holders of a commercial driver's license and certain mass transit employees to undergo random alcohol testing in accordance with federal requirements (see the next section).⁶⁵ Under any other circumstances, though, random alcohol testing—even of employees in safety-sensitive positions—is probably illegal under the ADA in the absence of individualized suspicion of alcohol use by a particular employee.⁶⁶



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Testing of Employees with a Commercial Driver's License and Mass Transit Employees

The federal Omnibus Transportation Employee Testing Act of 1991 requires employers to conduct drug and alcohol testing on employees who drive a vehicle requiring a commercial driver's license and on certain mass transit employees in accordance with the U.S. Department of Transportation's testing procedures.⁶⁷

The Federal Motor Carrier Safety Administration (FMCSA), a division of the Department of Transportation, issues the rules governing substance-abuse testing of employees driving a commercial vehicle.⁶⁸ The FMCSA defines “commercial motor vehicle” as a vehicle that is used in commerce to transport passengers *or* property, when the vehicle (1) weighs more than 26,001 pounds, (2) is designed to transport sixteen or more passengers, or (3) is

used in the transportation of hazardous materials. “Commerce” is broadly defined as “(1) any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State . . . and (2) [t]rade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.”⁶⁹

The Federal Transit Administration (FTA), another division of the Department of Transportation, issues the rules governing the substance-abuse testing of employees in safety-sensitive positions in agencies receiving federal transit funds.⁷⁰ The FTA’s regulations contain a definition of “safety-sensitive” that is specific to mass transit.

Both sets of regulations are comprehensive. They require pre-employment, post-accident, random, reasonable-suspicion, and return-to-duty testing, as well as follow-up testing after

a previous positive drug test. They also require education programs for covered employees and supervisors alike. The regulations specify how tests results are to be reported and maintained, and what actions employers should take in the event of a positive result.

Most public employers will have at least some employees who drive commercial vehicles and are covered by the FMCSA regulations. Larger employers and regional mass transit authorities also will have employees covered by the FTA’s mass transit rules. Such employees may be made subject to both the federal rules requiring testing and the individual employer’s drug-testing policy, provided that the policy is reasonable with-

in the meaning of the Fourth Amendment. For ease of administration, public employers may incorporate into their own policies as many of the rules and procedures of the Department of

Transportation, the FMCSA, and the FTA as are appropriate, again subject to the requirement that they be reasonable within the meaning of the Fourth Amendment as they are applied to employees not otherwise subject to the federal standards.

Procedural Requirements

Regardless of how often and under what circumstances a North Carolina public employer decides to drug-test its workforce, the North Carolina General Statutes require that employers comply with the requirements set forth in Section 95-232 for the collection and retention of samples, chain of custody, use of approved laboratories, and retesting of positive samples. In accordance with Section

95-234(e), the secretary of labor has adopted additional rules governing drug-testing procedures. They may be found at Rules 20.0101–20.0602 of the North Carolina Administrative Code (volume 13).

Notes

1. The Fourth Amendment is applicable to state and local governments through the Fourteenth Amendment.
2. See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616–17 (1989).
3. See *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987).
4. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Skinner*, 489 U.S. at 619.
5. *Skinner*, 489 U.S. at 619, citing Delaware



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v. Prouse, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

6. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989).

7. *Skinner*, 489 U.S. at 628–29, 633–34.

8. See *Von Raab*, 489 U.S. at 669–71, 677.

9. *Id.* at 670, 674.

10. See *Chandler v. Miller*, 520 U.S. 305, 321–22 (1977).

11. *Skinner*, 489 U.S. at 625; *Willner v. Thornburgh*, 928 F.2d 1185, 1190–91 (D.C. Cir. 1991).

12. See, e.g., *Von Raab*, 489 U.S. at 667, 671–72; *Carroll v. City of Westminster*, 233 F.3d 208, 212 (4th Cir. 2000); *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989); *National 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). See also *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989) (holding that chemical weapons plant employees have reduced expectation of privacy due to job’s special demands, requirement of extensive testing and probing, and need for security clearance).

13. See *Von Raab*, 489 U.S. at 670, 674; *Chandler*, 520 U.S. at 321; *Carroll*, 233 F.3d at 211. See also *Harmon v. Thornburgh*, 878 F.2d 484 (1989) (holding that federal government’s interest in integrity of its workforce and in public safety did not justify random drug testing of all prosecutors and all employees with access to grand jury proceedings; only if there were separate category of drug prosecutors would random testing be justified under *Von Raab*).

14. See *Von Raab*, 489 U.S. at 672; *Carroll*, 233 F.3d at 211–12; *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1262 (10th Cir. 1996).

15. See *Skinner*, 489 U.S. at 628; *Von Raab*, 489 U.S. at 670.

16. See *Harmon*, 878 F.2d at 491.

17. See *Von Raab*, 489 U.S. at 667, 671–72; *Carroll*, 233 F.3d at 212; *Guiney*, 873 F.2d at 1558; *Cheney*, 884 F.2d at 612; *Policemen’s Benevolent Ass’n*, 850 F.2d at 130.

18. See, e.g., *Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998).

19. See, e.g., *Saavedra v. City of Albuquerque*, 917 F. Supp. 760, 762 (D.N.M. 1994), *aff’d*, 73 F.3d 1525 (10th Cir. 1996).

20. See, e.g., *American Fed’n of Gov’t Employees, L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498, 1500 (N.D. Calif. 1991).

21. See, e.g., *id.*

22. See, e.g., *Solid Waste Drivers’ Ass’n v. City of Albuquerque*, 1997 WL 280761 *3 (D.N.M. 1997).

23. See, e.g., *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989).

24. On the difficulty of evaluating the safety-sensitive nature of a bus dispatcher position in the absence of a detailed job description, see

Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1022–23 (9th Cir. 1999).

25. See Kerns v. Chalfont–New Britain Township Joint Sewage Auth., 2000 WL 433983 *2 (E.D. Pa. 2000), *aff'd*, 263 F.3d 61 (2001). See also 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) (all holding that wastewater and sewage treatment plant operators are safety-sensitive positions).

26. Bannister v. Board of County Comm'rs of Leavenworth County, Kans., 829 F. Supp. 1249, 1253 (D. Kansas 1993).

27. See Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App., 149, 154, 432 S.E. 2d 137, 141 (1993).

28. Bannister, 829 F. Supp. at 1253, quoting Watson v. Sexton, 755 F. Supp. 583, 589 (S.D.N.Y. 1991) (holding that sanitation department enforcement agent, whose primary job duties were inspection of commercial and residential establishments for violations of sanitation codes, did not hold safety-sensitive position simply because she occasionally drove car to and from her rounds). See also American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 787 F. Supp. 255, 257 (D.D.C. 1992), and American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 744 F. Supp. 294, 301 (D.D.C. 1990) (holding that random drug testing of employees classified as motor vehicle operators who drove infrequently was unconstitutional).

29. See Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 823 (3d Cir. 1991).

30. See Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559, 561, 564–65 (5th Cir. 1998).

31. The last example demonstrates the difficulties that both public employers and the courts have in deciding whether public school employees whose duties do not create a risk of danger to other adults should be deemed to be in safety-sensitive positions merely because they work in the presence of young children. A Tennessee court has held that school teachers occupy safety-sensitive positions, because even momentary inattention or a delay in dealing with a potentially dangerous or emergency situation poses a high risk of harm when children are involved. See Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 368–69 (6th Cir. 1998). In contrast, courts in New York, Georgia, and the District of Columbia have held that, although drug use can impair a teacher's ability to supervise children, that fact alone does not turn the position of teacher into a safety-sensitive one. See Patchogue-Medford Congress of Teachers v. Board of Educ. of Patchogue-Medford Union Free Sch. Dist., 505 N.Y.S. 2d 888, 891 (1986); Georgia Ass'n of Educators v. Harris, 749

F. Supp. 1110, 1114 (N.D. Ga. 1990); Bangert v. Hodel, 705 F. Supp. 643, 649 (D.D.C. 1989).

32. See Burka v. New York City Transit Auth., 751 F. Supp. 441, 443–44 (S.D.N.Y. 1990).

33. International Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1464 (9th Cir. 1990); American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1501 (N.D. Calif. 1991).

34. Best v. Department of Health and Human Services, 149 N.C. App. 882, 893–95, *aff'd*, 356 N.C. 430 (2002); Nocera v. New York City Fire Com'r, 921 F. Supp. 192, 199 (S.D.N.Y. 1996).

35. See, e.g., Best, 149 N.C. App. at 893–94; Knox County Educ. Ass'n, 158 F.3d at 384–85; American Fed'n of Gov't Employees v. Martin, 969 F.2d 788 (9th Cir. 1992); Derwinski, 777 F. Supp. at 1501.

36. See, e.g., National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.D.C. 1990); Derwinski, 777 F. Supp. at 1501.

37. See, e.g., Martin, 969 F.2d at 793.

38. Best, 149 N.C. App. at 884–88, 895–99.

39. See Carroll v. City of Westminster, 233 F.3d 208, 211–12 (4th Cir. 2000).

40. Armington v. School Dist. of Philadelphia, 767 F. Supp. 661, 667 (E.D. Pa. 1991), *aff'd*, 941 F.2d 1200 (3d Cir. 1991).

41. See Saavedra v. City of Albuquerque, 917 F. Supp. 760, 763 (D.N.M. 1994), *aff'd*, 73 F.3d 1525 (10th Cir. 1996); Yeutter, 918 F.2d at 974. See also Martin, 969 F.2d at 790–92.

42. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 630 (1989).

43. See Burka v. New York City Transit Auth., 739 F. Supp. 814, 829 (S.D.N.Y. 1990).

44. See Skinner, 489 U.S. at 633. See also International Bhd. of Teamsters, Chauffeurs, Western Conference of Teamsters v. Department of Transp., 932 F.2d 1292, 1308 (9th Cir. 1991).

45. See United Teachers of New Orleans v. Orleans Parish Sch. Bd. through Holmes, 142 F.3d 853, 856–57 (5th Cir. 1988); Stanziale v. County of Monmouth, 884 F. Supp. 140, 146–47 (D.N.J. 1995) (holding that mistake by sanitary inspector does not immediately jeopardize public health and safety).

46. See United Teachers of New Orleans, 142 F.3d at 856–57.

47. See Plane v. U.S., 750 F. Supp. 1358 (W.D. Michigan 1990); American Fed'n of Gov't Employees, AFL-CIO v. Sullivan, 744 F. Supp. 294 (D.D.C. 1990). See also American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1502 (N.D. Calif. 1991), citing International Bhd. of Teamsters, 932 F.2d at 1292.

48. See Derwinski, 777 F. Supp. at 1502.

49. See American Fed'n of Gov't Employees,

AFL-CIO v. Roberts, 9 F.3d 1464, 1466 (9th Cir. 1993).

50. See Derwinski, 777 F. Supp. at 1502.

51. Harmon v. Thornburgh, 878 F.2d 484, 489 (1989) (comparing choice to apply for job requiring security clearance to choice to travel by air rather than by land and thus to subject oneself to FAA security inspections); Willner v. Thornburgh, 928 F.2d 1185, 1190 (D.C. Cir. 1991). Note that in *Von Raab*, one of the factors that lessened the privacy interest of the plaintiff-employees was that they were required to submit to a drug test only if they chose to apply for a promotion to a position involving drug interdiction.

52. Willner, 928 F.2d at 1190–91; National Treasury Employees Union v. Hallett, 756 F. Supp. 947, 948 (E.D. La. 1991).

53. Willner, 928 F.2d at 1189.

54. See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Harmon, 878 F.2d 454; Hallett, 756 F. Supp. 947.

55. Willner, 928 F.2d 1185.

56. See Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990).

57. See Baron v. City of Hollywood, 93 F. Supp.2d 1337, 1341–42 (S.D. Fl. 2000).

58. See *Von Raab*, 489 U.S. at 1394; Chandler v. Miller, 520 U.S. 305, 321 (1997) (emphasis added).

59. See 42 U.S.C. § 12112(a).

60. See 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

61. See 42 U.S.C. 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a), (b).

62. See 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10.

63. Employers should consult with their attorneys before making any decision to withdraw an employment offer on the basis of the results of an alcohol screen. Even though the applicant has the burden of proving that the real reason for the failure to hire was the employer's perception that the applicant was an alcoholic, many juries would have little trouble making that inference.

64. See EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, No. 915.002 (July 27, 2000), available online at www/eecoc.gov/docs/guidance-inquiries.html.

65. 29 C.F.R. § 1630.15(e) provides that "it may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation."

66. The author has been unable to find a single case directly addressing this issue.

67. See 49 U.S.C. § 5331; 49 C.F.R. pt. 40.

68. See 49 C.F.R. pt. 382.

69. See 49 C.F.R. §§ 382.103, 382.107.

70. See 49 C.F.R. pt. 655.