

Legal Q&A

By Laura Mueller, TML Legal Counsel

September 2009

Q. May a city perform random drug tests on its employees?

- A. A city may only drug test its employees without individualized suspicion, also referred to as “random drug testing,” if there is a “special need” that outweighs the individual’s privacy interest. *Skinner v. Ry. Labor Execs. Ass’n.*, 489 U.S. 602 (1989); *Nat’l Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989). This standard means that most city employees may not be tested for drugs without individualized suspicion. While a private employer may often have the ability to randomly drug test its employees, governmental entities, such as cities, are more restricted by the United States Constitution, including the search and seizure provisions of the Fourth Amendment. The primary reason a city might be able to “randomly” drug test an employee is if the employee performs safety-sensitive or security-sensitive duties. Not all police officers or firefighters fit into this category, but backhoe drivers might.

The TML Legal Department receives many calls from cities on this issue. Most of them either: (1) desire to implement random drug testing for all their employees; or (2) already have such a policy in place. Many are surprised to learn that they generally may not have random drug testing for all employees. Unless an exception applies (such as special safety or security concerns, reasonable suspicion, or Department of Transportation regulations), a city may not drug test its employees.

Q. Which employees may a city randomly drug test?

- A. A city may randomly drug test its employees who are in safety- or security-sensitive positions. Examples of job duties that the courts have found to be safety- or security-sensitive sufficient to warrant suspicionless drug testing have included driving passengers as United States Department of Transportation licensed drivers, operation of trucks that weigh more than 26,000 pounds, tending to or driving school children as school bus attendants and drivers, teaching children, armed law enforcement officials whose duties include interdiction of drugs; nuclear power plant duties, and working on gas pipelines, among others. Examples of employees whose job duties have *not* been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases and library workers. (Please contact the TML Legal Department for the citations to the cases in which these duties are discussed).

While who may be tested for drugs is always going to be a fact-based inquiry based on the duties of each employee, some duties lean toward allowing drug testing without individualized suspicion based on prior case law, including carrying of passengers, driving with commercial drivers licenses or United States Department of Transportation licenses, positions that are heavily regulated by state and federal law, and operating heavy machinery. Some duties and situations that, by themselves, may not warrant suspicionless drug testing include office duties, handling money, driving a city vehicle or

police car, prior drug use, or working with the public. Before performing a suspicionless drug test on an employee, a city should ensure that there is a safety or security issue involved in the person's job duties that would be affected by drug use. Since job duties and their safety- or security-sensitive nature is a fact issue, a city should always consult its city attorney or local counsel before implementing a random drug testing policy or testing any employee for drug use.

Q. What other times may a city drug test its employees?

- A. While a city may not usually randomly drug test its employees, some employees may be tested for drugs. Besides employees who perform safety- or security-sensitive functions as described above, individuals who may be tested for drugs include: (1) an applicant for employment, after the job offer is made but before the position is taken, if some safety or security concern is present; (2) an employee who drives commercial vehicles and who is covered by the U.S. Department of Transportation Regulations; or (3) an employee who the city has reasonable suspicion to believe is using drugs.

However, a city should adopt a written policy and consult with its city attorney before drug testing any of its employees or adopting a drug policy.

Q. What is reasonable suspicion?

- A. Reasonable suspicion is a decision that the supervisor needs to make based on objective factors such as the appearance or actions of the employee. For example, employees may arguably test for drugs after an accident. The employee's actions and appearance that cause the supervisor to have individualized suspicion that the employee is on drugs should be documented.

Q. Beside search and seizure constitutional issues, are there any other concerns with drug testing?

- A. Drug testing information is confidential and should be treated very carefully. Employers must comply with the Americans with Disabilities Act when dealing with the results of such tests. Employers are required to keep drug test results in a separate file from an employee's personnel file, and that file must remain confidential. 42 U.S.C. § 12112(d)(3)(B).

Also, a city should ensure that any drug testing or drug testing policy is applied equally to each similarly situated employee, to forestall complaints of discrimination.

Q. Does Texas regulate the drug testing of employees?

- A. The Texas Labor Code, Section 21.120, allows an employer, which includes a city, to adopt a drug-free workplace policy. However, the policy must not be written or applied in a discriminatory manner and must be in compliance with federal law.

Q. Should a city adopt a drug testing policy?

- A. Before a city implements any kind of drug testing, a city should adopt a written drug testing policy. It should also give the drug testing policy to each of its employees and have its employees acknowledge receipt of the policy. Also, it is a good idea for a city to adopt such a policy before a problem occurs.

Q. What considerations are there for a city that chooses to adopt a written drug testing policy?

- A. Drug testing policies raise constitutional issues such as the right to privacy and the right against unreasonable searches and seizures, as well as, under some circumstances, issues involving the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213 (1990). A drug testing policy should include when an employee may be drug tested, which employees or applicants may be tested, what job duties are considered safety or security sensitive, drug testing procedures that are minimally intrusive and respect the employee's right to privacy as much as possible, notice procedures for those who may be tested, how the results will be treated, and a policy for what occurs should a drug test come back positive. Also, many drug testing policies are included in "drug-free workplace" policies adopted by cities.

A city should also ensure that its policy follows any ADA regulations, as well as other state and federal laws that deal with medical information. The written drug policy should be strictly and consistently followed. Also, if a city is a federal contractor or a grantee of federal funds, the city must comply with the federal Drug-Free Workplace Act of 1988. This act requires that a city adopt a "drug-free awareness" program and drug policy. More information about this act and who is covered can be found at <http://www.dol.gov/elaws/asp/drugfree/screen4.htm>. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and mass transit industries. Any city employee with a Commercial Drivers License (CDL) would fall under this Act and would be required to be tested for drugs pre-employment, post-accident, reasonable suspicion, and other testing. Any written city policy should reflect these requirements if a city has CDL employees. More information about this act can be found at <http://www.dot.gov/ost/dapc/employee.html>.

Finally, a city should ensure that any adopted policy has been reviewed by its attorney and that implementation of the policy is guided by the city attorney's advice.

If your city has additional questions about drug testing policies or drug testing in general, please call Laura Mueller at the TML Legal Department or e-mail her at laura@tml.org.