Legal Q&A

By **Evelyn Njuguna**, TML Assistant General Counsel

Q Can a city perform random drug testing on all of its employees?

A No. Unlike a private employer, a governmental entity's ability to conduct drug testing on all its employees is limited by the Fourth Amendment to the United States Constitution. Because testing for drugs is considered a "search" under the Fourth Amendment, a city is generally prohibited from undertaking such test without "individualized suspicion". *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989). However, a limited exception to this rule allows a city to conduct suspicionless drug testing (also referred to as "random drug testing") of employees if a special need, outside the need for law enforcement exists, and such "special need" outweighs the employees' privacy interest. *See id at 652; Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

Q When is random drug testing based on a "special need" allowed?

A A special need beyond the need for law enforcement exists in "safety-sensitive" or "security-sensitive" positions that are "fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences." *Skinner*, 489 U.S. at 628. The courts have determined that employees who hold the following safety-sensitive positions may be randomly drug tested without violating the Fourth Amendment: (1) law enforcement employees who carry firearms or who are directly involved in drug interdiction (*Von Raab*, 489 U.S. at 679); (2) public transporters in industries in which there is a documented problem with drug or alcohol related incidents (*Skinner*, 489 U.S. 602); (3) operators of heavy machinery, large vehicles or hazardous substances (*Id*; *Aubrey v. Sch. Bd. of Lafayette Par*., 148 F.3d 559 (5th Cir. 1988)); (4) employees working in high-risk areas such as highway medians (*Bryant v. City of Monroe*, No. 14-30020, 2014 WL 6466862 (5th Cir. 2014)); and (5) wastewater treatment employees who handle hazardous chemicals (*Bailey v. City of Baytown, Texas*, 781 F. Supp. 1210 (S.D. Tex. 1991). Additionally, post-accident drug testing of employees holding safety-sensitive positions without individualized suspicion of wrongdoing has been upheld. *See Skinner*, 489 U.S. at 620.

A city that desires to implement a random drug testing policy should first articulate a "compelling interest" beyond the need for law enforcement that justifies such testing, and then determine which employees may legitimately be randomly tested. If a "compelling interest" beyond the need for law enforcement cannot be identified, the city should not perform random drug tests.

Q When is drug testing based on individualized suspicion allowed?

A A city can require an employee to undergo drug testing if the city has individualized suspicion that the employee is under the influence of drugs. *See Chandler v. Miller*, 520 U.S. 305, 313 (1997). Whether individualized suspicion exists is a fact-specific inquiry. Before requiring an employee to undergo a drug test, the city should be able to articulate specific

observations that led to the individualized suspicion, including, but not limited to, speech, behavior, conduct, or odor that suggests that an employee is under the influence of drugs, observation of drug use, a physical state of impairment, an incoherent mental state, or deteriorating work performance that is not attributable to other factors, changes in personal behavior that are otherwise unexplainable, or evidence of possession of illegal or unauthorized drugs or drug paraphernalia.

However, requiring non safety-sensitive employees injured in the scope of employment to submit to a drug test without any individualized suspicion of an employee's wrongdoing is prohibited. *See United Teachers of New Orleans v. Orleans Parish Sch. Bd. Through Holme*s, 142 F.3d 853 (5th Cir. 1998).

Q Can a city drug test all applicants for employment?

A Texas courts have not addressed whether a governmental entity can require drug testing of all applicants for employment. However, federal courts in other jurisdictions have struck down pre-employment drug testing of employees in non safety-sensitive positions. *See e.g. Am. Fed'n of State, County and Mun. Emps. 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013), cert. denied, 572 U.S. 1060 (2014) (mandatory drug testing of all job applicants struck down); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (post-job offer drug testing of a library page was unconstitutional as applied to that position because the page's duties were not safety-sensitive). Additionally, one court concluded that an employee's submission to drug testing, on pain of termination, does not constitute voluntary consent. *See Scott*, 717 F.3d at 873. Although these cases are not binding on Texas employers, they are persuasive. Accordingly, a city that has or desires to implement a policy requiring pre-employment drug testing should consult with local counsel regarding this matter.

Q What rules apply to employees and applicants for employment who operate commercial motor vehicles?

A All employees of a city who operate commercial motor vehicles that are subject to commercial drivers' license (CDL) requirements must undergo drug and alcohol testing pursuant to federal Department of Transportation regulations. *See* 49 U.S.C. §31306; 49 C.F.R. Part 382. Said employees are subject to post-accident, random, reasonable suspicion, return-to-duty, and follow-up testing. See 49 CRF §§382.302; .305; .307; .309; and .311. Also, applicants for employment who are subject to Department of Transportation (DOT) regulations must receive a negative drug test before being allowed to operate a commercial motor vehicle. *Id*. §382.301. A city may not allow a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive duties. *Id*. §382.211.

Additionally, beginning on January 6, 2020, all employers, including cities, who employ drivers with CDLs are required by federal law to use DOT's Federal Motor Carrier Safety Administration's Commercial Driver's License Drug and Alcohol Clearinghouse to determine a CDL driver's drug and alcohol program violations. *Id*. §382.601 et seq. In addition, employers and medical review officers, or their designated representatives, are required to report information about current and prospective employees' positive drug and alcohol test results, as

well as refusals to submit to testing, through the clearinghouse. *Id.* The clearinghouse can be accessed here: https://clearinghouse.fmcsa.dot.gov.

Q Can a city require an individual to submit to and pass a drug test before the individual can be appointed to or run for an elective city office?

A Not likely. The Supreme Court of the United States has determined that requiring drug testing of elected officials, without individualized suspicion, as a condition for running for office is not permissible. *See Chandler*, 520 U.S. 305. The court found that there was no special need so substantial to override the individual's privacy interest so as to suppress the Fourth Amendment's normal requirement of individualized suspicion. *Id*.

Q Are the results of a drug test confidential?

A Generally, the results of a drug test should be kept confidential and not disclosed to third-parties without the employee's consent. If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, this information must treated as a confidential medical record and maintained in a secure file separate from an employee's personnel file. *See* 42 U.S.C. §12112(d)(3)(B). As a best practice, drug test results received by a city should only be shared with city personnel on a need-to-know basis.

DOT regulations allow an employer to release the results of an employee's drug or alcohol test without the employee's consent in certain legal proceedings, including a lawsuit (e.g. a wrongful discharge action), grievance (e.g. an arbitration concerning disciplinary action taken by an employer), or administrative proceeding (e.g. an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test. 49 C.F.R. §40.323. An employer is also allowed to release test results in response to a court order. *Id.*