C S E A

DRUG AND ALCOHOL TESTING

IN THE PUBLIC AND PRIVATE SECTORS

CSEA
Local 1000 AFSCME, AFL-CIO

by the
Legal Department

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DRUG AND ALCOHOL TESTING

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In the private sector, drug and alcohol testing for current bargaining unit members is a mandatory subject of bargaining. The NLRB has specifically found that an employer's "newly imposed requirement of drug/alcohol testing for employees who require medical treatment for work injuries is a mandatory subject of bargaining." The NLRB reasoned that the employer's "drug/alcohol testing requirement is a condition of employment because it has the potential to affect the continued employment of employees who become subject to it." This reasoning arguably would be applicable to all forms of drug testing in the private sector, including reasonable suspicion and random drug testing.

2. Job Applicants

Drug and alcohol testing of job applicants -- who are not yet "employees" -- is not a mandatory subject of bargaining.

B. Public Sector (New York State)

1. Current Employees

Drug and alcohol testing of current bargaining unit members in the public sector may be negotiable. PERB has squarely held that the procedures and consequences associated with the implementation of drug testing for current employees are mandatory subjects of bargaining. PERB has not yet directly addressed the issue of whether the decision to implement drug testing (as opposed to the testing procedures) is a mandatory subject of bargaining. However, the Board has found that the

negotiability of a demand for drug testing, and whether it could be subject to interest arbitration, "depends entirely upon the constitutionality of the proposed drug testing."

2. Job Applicants

In the public sector, as in the private sector, drug and alcohol testing of job applicants is not a mandatory subject of bargaining because job applicants are not "public employees."

II. Constitutional Limitations

A. Fourth Amendment

What does it mean for a drug test to be constitutional? Most often, it means that such testing passes muster under the Fourth Amendment to the United States Constitution. The Fourth Amendment says:

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.

There is a parallel provision in the New York State Constitution. The Fourth Amendment does not define the term "search," but 200 years of judicial interpretation have given definition to that term. Some of that judicial interpretation has been directed at the Fourth Amendment's applicability to drug tests.

B. Searches and seizures: Drug tests can be "searches"

The United States Supreme Court has held that drug tests are "searches" under the Fourth Amendment. The New York State Court of Appeals agrees.

C. "Unreasonable" searches

It is only unreasonable searches that are prohibited by the Fourth Amendment. In determining whether a search is "reasonable," the Courts apply a test which "balance[s] the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." For customs agents who were directly involved in the interdiction of illegal drugs, the Courts have found that, by choosing such employment, these employees had a diminished expectation of privacy and when weighed against the Government's compelling interest in safeguarding its borders. Thus, the Court held that the random drug testing of these agents was reasonable.

In the PERB context, an Administrative Law Judge has held that a police department's demand for random drug testing was unconstitutional and, thus, had been improperly submitted to an interest arbitration panel. The ALJ found several flaws in the proposed testing policy; she found the fatal flaw to be that, under the policy, the Chief of Police determined the frequency and timing of the tests. The ability to make that determination, according to the ALJ, resulted in the employees' expectation of privacy being "subject to unregulated discretion," thereby constituting an unreasonable search in violation of the Constitution.

Whether public employees' positions are safety sensitive frequently determines whether random testing will be upheld in other jurisdictions pursuant to a "balancing of interests" test. There are a range of outcomes in the different jurisdictions. For example, the Federal District Court in West Virginia balanced the equities concerning random testing in favor of teachers, whom it held did not have safety sensitive positions. The safety sensitive nature of a landscaper's position for the Passaic Valley Sewerage System tipped the balance in favor of the employer's random testing program (unpublished opinion) in Federal District

Court in New Jersey.

D. Reasonable suspicion

Where a public employer has reasonable suspicion of an employee's job-related drug or alcohol use, that employee can be subjected to a test without running afoul of the Fourth Amendment. The procedures for testing and the consequences for testing positive based on reasonable suspicion are mandatory subjects of bargaining. Whether the decision to test based on reasonable suspicion is a mandatory subject of bargaining in the public sector has not been specifically addressed.

E. Waiver of constitutional rights

Some courts have held that bargaining unit members' Fourth Amendment rights can be waived by a union through collective bargaining, subject, of course, to its duty of fair representation.

III. OTETA (Omnibus Transportation Employees' Testing Act of 1991) (Overlaps both public and private sectors)

OTETA requires testing for alcohol and drug use. Drug tests look for indicators (known as "metabolites") of the following drugs: marijuana, cocaine, amphetamines, opiates (such as heroin or morphine), and PCP.

A. Safety sensitive positions: drivers

OTETA is generally applicable to drivers who need a Commercial Driver License ("CDL") to drive their assigned vehicles. Such vehicles include school buses, snowplows, tractor-trailers, dump trucks and other heavy equipment. Regulations under OTETA are issued by the Federal Highway Administration, a subdivision of the United States Department of Transportation. Safety sensitive positions that are regulated by the United States Coast Guard (i.e., Canal Corporation),

the Federal Aviation Administration, the Federal Transit Administration, the Federal Railroad Administration, the Department of Energy and certain other federal agencies may be subject to testing that is the same or similar to the OTETA testing. Any question with respect to whether a position is properly subject to testing may be directed, through your local or unit officers or your CSEA Labor Relations Specialist, to the CSEA Legal Department.

B. Pre-Employment

OTETA requires "pre-employment" testing for applicants for hire, and whenever an employee is promoted, transferred, assigned or re-assigned to a driving position.

C. Post-accident

OTETA requires "post-accident" testing. The accidents contemplated by this rule are generally those which involve a fatality or either bodily injury with immediate medical treatment away from the scene or disabling damage to any motor vehicle requiring tow away, both when coupled with a citation being issued.

D. Reasonable suspicion

OTETA requires the testing of employees whom the employer reasonably suspects to have used drugs or alcohol. OTETA sets forth very specific criteria for the employer to follow in order to ensure that such testing is, in fact, reasonable. The test "must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver" and a supervisor trained in making such observations must make the determination.

E. Random

OTETA requires that the employer ensure that a certain

percentage of its drivers are randomly tested for drugs and alcohol in each calendar year. The testing percentage initially set at 50% for alcohol and 25% for drugs, is determined by the Federal Highway Administration, based on experience. Central test results show drug/alcohol presence. The drivers to be tested must be selected using a scientifically valid method that ensures that "each driver shall have an equal chance of being tested each time selections are made."

F. Return-to-duty

Drivers failing a drug or alcohol test cannot perform the duties of a driver until after passing a return-to-duty test.

G. Follow-up

Drivers failing a drug or alcohol test, in addition to the return-to-duty test, are subject to unannounced follow-up tests, the number and frequency of which must be determined by a substance abuse professional, but which must consist of at least six tests in the first twelve months.

H. Medical Marijuana

New York's Compassionate Care Act legalizes and regulates the manufacture, sale and use of medical marijuana in the State. The Act appears in Title V-A in Article 33 of the Public Health Law titled "Medical Use of Marihuana."

Medical marijuana remains prohibited by Federal law. This means that detection of cannabis in a test given pursuant to OTETA for a CDL holder will result in all of the same consequences that it did prior to New York's legalization of medical marijuana. When a CDL holder tests positive based on the legal use of prescribed opioids, the medical review officer can revise the results of a positive test to negative, based on the medical certification. This kind of amendment would not be permitted in the case of medical cannabis, even though it was

lawfully prescribed in New York.

Hence, employees subject to testing pursuant to OTETA must be aware that the consequences for testing positive for marijuana remain. Some random testing of employees exists pursuant to contract or negotiated policies. For members or employees subject to that type of testing, but not to OTETA, a positive cannabis screening should be treated like any other test that is positive for a bona fide prescribed medication.

IV. Procedures

A. Alcohol test

The test for alcohol is performed by a breath alcohol technician ("BAT") using an evidential breath-testing device ("EBT"). A screening test is performed first. If the screen gives a positive result, a confirmation test is performed.

B. Drug test

The test for drugs is performed on a urine specimen. The specimen is allocated to two separate containers, to allow for a split-sample test, if necessary.

When the Centers for Disease Control and Prevention tested the results of thirteen leading drug testing labs, they found error rates of 37-67%. In response to this study, the Department of Health and Human Services [HHS] established a laboratory certification program administered by the Substance Abuse and Mental Health Services Administration. [SAMSHA] Federal certification has been persuasive to some arbitrators. Uncertified lab tests have been held to be illegal and unusable to support discipline in government mandated programs.

C. Collection

Our experience suggests that several collection methods

are used. Some employers contract with a hospital or similar medical facility and will direct the selected employees to go to that facility that then performs all of the functions related to the test. Another popular method is for the employer to contract with a vendor to come to the worksite to collect the urine specimens and to provide a Medical Review Officer ("MRO"). That vendor may, in turn, contract with laboratories to perform the actual testing of the samples and split-samples of the urine specimens.

Federal regulations are very specific with respect to the procedures to be used at the collection site to ensure the integrity and identity of the specimen and the chain of custody. These regulations are found at 49 CFR Part 40. They have been amended over the years since OTETA was enacted in 1991 and now read in a question and answer format. They are lengthy and are written in detail covering all aspects of the sample collection and testing procedure.

The regulations are far too voluminous to repeat in detail here. The following is a general summary of the topics covered: (1) training of collection and testing personnel; (2) use of appropriate collection and testing sites; (3) protection of the security and integrity of the urine specimens (i.e., the "chain of custody"); (4) use of proper paperwork, testing devices, collection kits and shipping methods; (5) steps for collection and testing site personnel to do before, during and after the collection; (6) requirements for the laboratories to handle, test and measure specimens; (7) qualifications, role and communication requirements for MRO and SAP; and (8) applicable confidentiality and information release rules related to the testing.

D. Chain of custody

"Chain of custody" refers to the procedures that are used to account for the integrity of each urine specimen as it goes to its various stations, i.e., collection site, MRO, laboratory, etc.

SAMSHA regulations require that each person who handles a specimen document that fact and sign a Federal Drug Testing and Control Form in the location designated for their function.

E. Testing

The "test" itself is actually several different processes. A sample of the specimen is screened using one process. When the screen detects the presence of drugs, a confirmatory test is performed on that sample using a different process. Generally, different cut-off levels are used for the screen and the confirmatory test. If either the screen or the confirmatory test is negative, the test is declared negative and that is the end of the test. If the screen and the confirmatory test both find the presence of drugs, the MRO is notified and in turn, contacts the employee. The employee can request that the MRO have the split-sample of the specimen tested, in which case the split-sample is sent to a different laboratory. If the second lab finds the presence of drugs in the specimen, it reports the result to the MRO as a confirmed positive.

F. Direct observation testing

Direct observation is required for all OTETA return-to-duty and follow-up tests. The direct observation requirement is relevant ***only*** to return-to-duty or follow-up tests. This requirement withstood a court challenge by several railroad and airline employee unions as being arbitrary and capricious under the Administrative Procedure Act. They alleged that it was an unwarranted violation of employees' privacy rights inasmuch as "direct observation" includes a lab employee actually watching the employee urinate. The United States Court of Appeals, DC Circuit held that (1) the DOT's justification for the rule did not violate the APA's prohibition on arbitrary and capricious agency action and (2) even though direct observation is highly intrusive, the DOT's regulation complied with the Fourth Amendment's protection against unreasonable searches.

G. MRO

The MRO plays a key role in the administration of the drug tests. Generally, it is the MRO who sends samples of the collected urine specimens to the various labs, reviews the chain of custody, and communicates with the employee and the employer. It is the MRO who must verify the positive test result. Before the employer is notified of a confirmed positive test, the MRO should discuss the result with the employee to see if there could be some explanation for the positive result, other than illegal drug use.

Generally, the MRO is looking for "cross-reactivity." Some substances may be so similar to controlled substances in chemical make-up that they react in much the same way a controlled substance would react during the testing process, thereby causing a false positive. The MRO is required to be a licensed physician with knowledge of substance abuse disorders and must have "a detailed knowledge of possible alternate medical explanations" for a positive test result.

If the MRO is satisfied that the employee has shown an alternate medical explanation for the result, the MRO should not verify the test result as positive. Otherwise, the MRO verifies the result and reports it to the employer and/or the employer's designated Substance Abuse Professional as a confirmed positive test.

H. SAP

OTETA requires "referral, evaluation, and treatment." After the testing is complete and the results are verified, an employee who tests positive will be sent to see a Substance Abuse professional ("SAP"). The SAP shall determine "what assistance, if any, the employee needs in resolving problems associated with alcohol misuse and controlled substances use." The SAP shall also determine the number and frequency of the follow-up tests.

V. Public Policy on Employee Discipline

OTETA takes no position on employee discipline, leaving the matter entirely to the employer-employee relationship and, where applicable, collective bargaining. As stated above, both PERB and the NLRB hold that the subject of consequential action taken on positive test results is a mandatory subject of bargaining. Furthermore, the United States Supreme Court has recently held that it is not a per se violation of public policy for an arbitrator to direct an employer to reinstate a driver who has failed multiple drug tests.

VI. Settlement Agreements

Drug or alcohol testing can be incorporated into settlement agreements, particularly in disciplinary cases. Individual employees, of course, can waive their own Fourth Amendment rights, if any, and a union can waive such rights for its bargaining unit members, as well. Ideally, procedural safeguards such as those set forth in the OTETA regulations should be incorporated into any settlement agreement which subjects an employee to drug or alcohol testing.

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