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PUBLIC ENTITIES, INDEPENDENT CONTRACTORS, AND RANDOM DRUG TESTING: CAN A PUBLIC ENTITY PERFORM RANDOM DRUG TESTS ON THE EMPLOYEES OF ITS INDEPENDENT CONTRACTORS?

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Local governments want to improve public and workplace safety, but also spend taxpayers' money wisely. As part of the efforts to improve safety, some local governments are interested in performing random drug testing for the employees of their independent contractors. May a public entity require random drug testing of employees of its independent contractors? While the law is not settled on this question, it appears that a public entity may require such tests to the extent, but only to the extent, that it can constitutionally require such tests of its own employees. Even in cases where it would be constitutionally permitted, however, it may not be a good idea and there may be better ways to achieve the underlying goals.

Constitutional Implications

The Fourth Amendment and Public and Private Employers

The Fourth Amendment of the U.S. Constitution prohibits “unreasonable searches and seizures” by the government.¹ Drug testing by a government employer is considered to be a search under the Fourth Amendment.² The “reasonableness” of a drug test by a government employer varies according to the situation. Generally, for random drug testing to be constitutional, a government employer must have the voluntary consent of the employees or a

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1. U.S. CONST. amend. IV.

2. Nat'l. Treasury Empl. Union v. Von Rabb, 489 U.S. 656 (1989).

“special need” that justifies the intrusion on employees’ Fourth Amendment rights.³ Neither a warrant, nor individualized suspicion of drug activity, are required to conduct a drug test where compelling government interests such as public safety outweigh individual privacy interests.⁴ For example, random drug testing programs associated with the government have generally been upheld where (a) there was undisputed evidence of drug use on the job in a certain industry,⁵ (b) employees worked directly in drug interdiction,⁶ (c) employees carried firearms,⁷ (d) employees handled classified documents,⁸ (e) employees worked in law enforcement,⁹ or (f) employees performed “safety-sensitive” tasks such as driving¹⁰ and airport maintenance.¹¹ It is important to note that, although many courts have upheld random drug testing for employees in “safety-sensitive” positions, a few have struck it down.¹²

Random drug testing independently mandated by private employers is not subject to Fourth Amendment scrutiny, which has been construed by the U.S. Supreme Court to apply only to government action or involvement.¹³ In general, therefore, a private employer, such as an independent contractor, may require that employees submit to random drug testing as a condition of employment.¹⁴

3. *See* *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602 (1989).

4. *Id.* at 621-24.

5. *Id.* at 620-24.

6. *Von Rabb*, 489 U.S. at 670.

7. *Id.*

8. *Id.*

9. *Police Benevolent Ass’n Local 318 v. Township of Washington*, 850 F.2d 133, 141 (3rd Cir. 1988).

10. *Teamsters v. Transportation Dep’t.*, 932 F.2d 1292 (9th Cir. 1991) (motor vehicle operators).

11. *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149, 432 S.E.2d 137 (1993) (building maintenance requiring driving on apron of flight area).

12. *See, e.g., Solid Waste Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998) (drug testing of garbage truck mechanics not warranted by “special need”).

13. *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).

14. *See Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 862 (7th Cir. 1999).

Constitutional Rights and the Distinction between Employee and Independent Contractor

As a matter of basic contract law, it would appear to make sense that if a private contractor can require its employees to submit to drug testing, then a contract condition requiring that a contractor impose such testing on its employees would not be problematic.¹⁵ However, in a case assessing federal government regulations that required drug testing in the private railroad industry, the Supreme Court emphasized that the Fourth Amendment applied not only to drug testing by the government, but also those acting at its direction or as its agent.¹⁶ Furthermore, even if the government has not compelled the drug testing by a private employer, the Fourth Amendment may nonetheless be implicated depending on the level of governmental encouragement or participation.¹⁷ Where a governmental entity actively recommends, legally facilitates, or, in particular, conducts an allegedly “private” drug testing program, the program would most likely have to pass the same Fourth Amendment reasonableness requirement as drug testing performed directly by the government.¹⁸ Although this case reviewed testing programs imposed by regulation rather than contract, it does lend credence to the idea that a government entity could require random drug testing through contract, only if the testing could also be imposed by it directly without violating the Fourth Amendment.

Cases involving infringement of other constitutional rights in a contract situation are also instructive. Where a governmental entity has terminated or refused to renew an at-will contract because of the speech or political affiliation of an independent contractor, the Supreme Court has held that the government violated the contractor’s First Amendment right to free speech and association.¹⁹ The Court held,

15. No state or federal cases have focused specifically on whether a public entity may constitutionally require through contract and/or actually perform random drug testing on the employees of its independent contractors.

16. *See Skinner*, 489 U.S. at 614-15 (where government regulations compelled drug testing by private employer, test was a search subject to Fourth Amendment scrutiny).

17. *See id.*

18. *See id.* at 615-16.

19. *See Board of County Commissioners, Wabaunsee Co., Kansas v. Umbehr*, 518 U.S. 668 (1996) (contract renewal refused where contractor publicly criticized board’s action and policies); *O’Hare Truck Service, Inc. v.*

based on precedent involving government employees, that unless the government's need for political fealty or a harmonious relationship with an independent contractor outweighed the contractor's interests in free expression or association, it could not condition the continuation of the contract relationship on relinquishing rights protected by the First Amendment.²⁰

Especially pertinent to the question at hand, the Court emphasized that the common legal distinction between employees and independent contractors made for tort and agency purposes was not legally relevant in the context of their constitutional rights: to rule otherwise would allow the government to manipulate the exercise of constitutional rights based on how it labeled a government service provider.²¹ The Supreme Court has reached similar conclusions with regard to statutes requiring a clause in all government contracts providing for cancellation and future disqualification of contractors who refuse to waive their Fifth Amendment privilege against self-incrimination.²² When applied to the question of conditioning contracts on random drug testing of a contractor's employees, this logic supports the idea that a government entity could contract for random testing of an independent contractor only where it could require random testing of its own similarly situated employees.

In sum, while a city or county government may be able to secure through contract the right to require or perform random drug testing on an independent contractor's employees if they perform "safety-sensitive" tasks, it may not be able to do so for all of the contractor's employees. Even though private employers may randomly drug test any of their own employees, courts may look critically at random drug testing imposed on a contractor by a city or county government.

City of Northlake, 518 U.S. 712 (1996) (contractor taken off rotation list for refusing to make a political contribution to candidate in office).

20. *Umbehr*, 518 U.S. at 685; *O'Hare*, 518 U.S. at 716-19.

21. *Umbehr*, 518 U.S. at 678-680; *O'Hare*, 518 U.S. at 721-22.

22. See *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973).

Potential Liability under North Carolina Law

Involvement with an Independent Contractor's Employees

In North Carolina, an independent contractor is not legally differentiated from an employee by virtue of the label applied by the parties to the relationship. Rather, the actual relationship created by the agreement is determined as a matter of law based on "the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed."²³ Generally, eight factors are considered in the determination, no one being determinative: "whether the employed, (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time."²⁴

Imposing a condition of random drug testing by contract could implicate at least factors (f) and (g). First, if an employee tested positive for drugs, there is the question of who should receive the test results and decide how to deal with the employee. If a city contracted for the right to dismiss the contractor's employees for positive drug screens, the contractor might no longer be considered "free" to make its own personnel decisions. Next, the employees would be subject to random interruption of their work for drug testing, detracting from the "full control" of the contractor over its assistants. If the city or county intruded into other aspects of the contractor's work, in addition to those affected by the testing, a court might be likely to find that the contractor and/or its employees were, in fact, government employees.

Whether or not a government service provider is an independent contractor or an employee can greatly affect the governmental entity's legal responsibilities for and toward the provider. For example, employers in North Carolina are liable for worker's compensation for most work-related injuries to

23. *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 79, 511 S.E.2d 9, 13 (1999).

24. *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E.2d 187, 191 (1999).

employees.²⁵ They can also be liable for torts committed by their employees while on the job.²⁶ Furthermore, employers must pay unemployment taxes on their employees.²⁷ For these and other reasons, a city or county government should only decide to contract to require random drug testing of a contractor's employees after careful consideration of exposure to possible employer-like responsibility for those employees.²⁸

Undertaking a Drug Testing Program

By taking on the actual drug testing, a governmental entity could expose itself to liability for drug-related accidents if the random testing program or related personnel action is carried out negligently. Furthermore, even if the drug testing program were conducted properly by the governmental entity, this connection with the employees of the contractor will make the entity a likely litigation target in the event of any drug-related accidents. In addition, any employer requiring or examiner conducting a drug test must also comply with the statutory procedures for administration of such tests²⁹ in order to avoid civil penalties³⁰ and/or potential liability for wrongful discharge.³¹

Less Problematic Ways to Encourage Safe and Drug-Free Workplaces for Contractors

If a public entity required random drug testing of independent contractors' employees through a regu-

25. See N.C. GEN. STAT. §§ 97-1 to 97-101.1.

26. *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 414, 473 S.E.2d 38, 41 (1996).

27. See 26 U.S.C.A. 3301.

28. There have been no cases in North Carolina indicating whether contract requirements for random drug testing alone or in addition to other conditions result in employer-like responsibility for a municipal contract partner.

29. N.C. GEN. STAT. § 95-232.

30. N.C. GEN. STAT. § 95-234.

31. See *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 515 S.E.2d 438 (1999) (suggesting employer could be liable for wrongful discharge if it knew or suspected drug testing laboratory did not qualify as an "approved laboratory").

lation, policy, or contract condition, but did not perform or control the actual testing or personnel actions based on the results, it would lessen the level of involvement and thus the chance for potential employer liability. However, the testing might be subject to constitutional review due to governmental endorsement, thus limiting the types of employees who could be tested.

If an independent contractor already has a random drug testing program, governmental endorsement of such testing may be unlikely to affect its validity or scope. Therefore, in choosing between contractors, a city or county entity could take into consideration whether candidates have a random drug testing program in place, or at the very least, a low rate of drug-related accidents.

A public entity could also indirectly encourage contractors to establish drug testing programs by requiring as part of the contract that they adopt a drug-free workplace policy modeled on the federal Drug-Free Workplace Act of 1988.³² In short, the Act requires that contractors prohibit drug activities in the workplace, establish a drug-free awareness program, and sanction employees for violation of the policy. Interestingly, however, the Act does not mention, much less mandate, any form of drug testing.³³ This legislative omission may result from consideration of the constitutional and liability concerns discussed above. Requiring that a contractor have a drug-free workplace policy without mentioning testing would allow a public entity to promote workplace safety without affecting the potential range of the contractor's employees that would be subject to random testing.

Regardless of how a governmental entity chooses to promote drug-free workplace initiatives in its contract relationships, none of the options discussed here should be substituted for comprehensive insurance requirements and wise contract provisions regarding the assignment of liability between the parties.

32. 41 U.S.C.A. 701 (applied only to federal contracts, but could be incorporated by reference into local government contracts).

33. See *Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345 (1993) (holding that because the Act did not require drug testing, compliance could not confer state actor status for Fourth Amendment purposes).

Conclusion

As part of preventing drug-related accidents in the workplace that may result in property damage or injury to workers or citizens, local and state governmental units may exercise a variety of options to encourage their independent contractors to have drug-free employees. Although a governmental entity may perform or require random drug testing on a contractor's employees, the scope of the testing program is likely to be limited by the Fourth Amendment to only certain types of employees. Moreover, by undertaking or insisting on the testing, a governmental entity could open itself up to employer-

like liability for the contractor's employees or liability for negligence if the testing program is not properly administered. On the whole, a governmental entity may prefer to avoid the risk of litigation on constitutional or liability issues by indirectly encouraging contractors to maintain drug-free workplaces. Reviewing independent contractors' accident histories and requiring that they institute drug-free policies, but allowing them to decide on their own whether a random drug testing program is necessary, may achieve optimum results for those governmental units interested in promoting safety and efficiency without incurring liability.

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