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Recent Developments on Drugs in the Workplace

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Two significant developments concerning drugs in the workplace occurred recently. First, on March 18, 1989, the Drug-Free Workplace Act of 1988 took effect. Second, on March 21, 1989, the United States Supreme Court handed down its first rulings on the constitutionality of drug testing in the public sector. This bulletin summarizes the new act and the Supreme Court rulings, and offers some advice to local government employers in complying with their requirements.

The Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act of 1988[1] was enacted by Congress on November 18, 1988, and is effective March 18, 1989. The act requires that all recipients of federal grants certify to the federal agency from which the grant is received that they will maintain a drug-free workplace. Note, however, that a city or county should first determine whether it qualifies as a "grantee" as that term is defined by the federal regulations implementing the act. As stated in the regulations, "the term grant includes only assistance from an agency directly to a grantee. That is, if a Federal agency provides financial assistance to a State agency, which in turn passes through the assistance to several local agencies, only the State agency that receives the assistance directly from the Federal agency, and not the local agency, gets a 'grant.'"[2] Local governments are therefore advised to determine the source of all federal grants they receive; if the federal moneys are administered through a state agency (such as the Department of Human Resources or the Department of Natural Resources and Community Development), then the local entity has no responsibility for certifying a drug-free workplace. Rather, the state agency through which the federal funds are channeled has the responsibility for complying with the act. But where federal money is received directly by local governments (e.g., funds from the United States Department of Education to county departments of mental health, funds from the United States Federal Emergency Management Agency to county social services departments, or community development block grants from the United States Department of Housing and Urban Development to municipalities), the requirements of the act apply.

Even where a local government receives federal funds directly, it should be noted that the term *employee* is defined narrowly by the regulations to cover only those persons "directly engaged in the performance of work pursuant to the provisions of the grant."[3] The effect of this narrow definition is to limit the requirements of the act to the specific local government program receiving federal funds,

not the entire local government entity.

The act requires that grantees:

1) Develop a policy statement to the effect that all employees have the right to a workplace free of drugs,
2) Communicate the policy to employees,
3) Establish a drug-free awareness training program,
4) Notify the federal grant agency of any employee convictions for drug-related violations on the employer's premises,
5) Impose a sanction or require participation in a rehabilitation program for any convicted employee, and
6) Make a good faith effort to maintain a drug-free workplace.

These requirements are discussed in turn below.

The first requirement of the act, that a policy statement be developed, may be accomplished by the adoption of a personnel policy that (1) notifies employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace (although the term *workplace* is not defined clearly in the act) and (2) specifies the actions that will be taken against employees who violate the policy. To accomplish this requirement, it is suggested that a basic policy statement be enacted by local governments as a resolution or ordinance, covering all employees engaged in work funded directly by federal grants. In addition, the local government must submit a written certification to the federal agency from which a grant is received that as a condition of the grant, no employee will engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant.[4] A sample policy follows.

Sample Drug-Free Workplace Policy

Drugs at the Workplace Prohibited. No employee engaged in work funded by a federal grant may unlawfully manufacture, distribute, dispense, possess, or use in the workplace any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, or any other controlled substance. *Workplace* is defined as the site for the performance of work done in connection with a federal grant and includes any [employer] building or premises or vehicle.

Notice of Conviction Required. As a condition of employment, each employee engaged in work funded by a federal grant shall notify his or her supervisor of his or her conviction of any criminal drug statute for a violation occurring in the workplace no later than five days after such conviction.

Penalty for Noncompliance. As a condition of employment, each employee engaged in work funded by a federal grant shall abide by the terms of this policy. An employee who violates the terms of this policy may be disciplined, up to and including dismissal, or may be required to participate in a drug abuse assistance or rehabilitation program approved by [employer].

The second requirement of the act, that the policy be communicated to employees, may be accomplished by including a copy of the policy or certification with employees' paychecks, posting the policy on official bulletin boards, including the policy in employee handbooks or personnel manuals, distributing a copy at employee orientation sessions, or by any other means designed to ensure employee awareness of the policy.

Whether the means of communication described above are used or not, the act's third requirement is that employees receive training on drugs in the workplace. Grantees are to establish a drug-free awareness training program, which is to inform employees about "(1) the dangers of drug abuse in the workplace; (2) the grantee's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed upon employees for drug abuse violations occurring in the workplace."[5]

The fourth requirement of the act is that the grantee notify the federal grant agency of an employee's conviction for any drug-related violation on the employer's premises. This reporting requirement must be interpreted in a manner consistent with the personnel privacy records acts, G.S. 153A-98 (covering county employees) and G.S. 160A-168 (covering municipal employees), which make an employee's record of conviction (and the reasons for his or her dismissal) confidential. However

G.S. 153A-98(c)(5) and G.S. 160A-168(c)(5) permit disclosure of a portion of a personnel file by the official having custody of the records to an official of the federal government when "necessary and essential to the pursuance of a proper function of the inspecting agency." The grantee's notification of employee conviction for drug-related violations would appear to meet this exception.

The act and its regulations also provide that if "such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace,"[6] then the grantee shall be deemed in violation of the act and may lose federal funds. A problem may arise in determining how many employee convictions constitute evidence of bad faith. The regulations state that this determination must be made on a case-by-case basis: "The facts and circumstances of grantees and employee drug problems vary so much that it would be virtually impossible to prescribe an across-the-board standard for how many convictions it would take before an agency would find a grantee in violation."[7] Note, however, that convictions for off-duty drug abuse by employees are not grounds for revoking grants.

The fifth requirement of the act is that grantees establish as a condition of employment for employees that they (1) refrain from drug use at the workplace and (2) notify the grantee/employer of any drug conviction within five days of its occurrence. Under the terms of the act, if an employee of a local government grantee is convicted as a result of drug use at the workplace, then the grantee is required either to take disciplinary action against the convicted employee (up to and including dismissal) or to require the employee to participate in an approved drug abuse assistance and rehabilitation program. Failure to impose sanctions or require rehabilitation efforts may result in the local government grantee losing federal funds.

The sixth requirement of the act is that grantees make a good faith effort to maintain a drug-free workplace. This requirement is apparently fulfilled if the grantee implements the other five requirements discussed above.[8]

Local government officials should determine the extent to which they receive federal funds directly from the federal government and decide whether they are grantees as defined by the act. Assuming that they meet the definition, the steps outlined above must be taken. It is suggested that a comprehensive personnel policy addressing all six requirements of the act be developed and implemented immediately. As a policy matter, some thought might be given to the question of whether these requirements should be extended to all employees of the local government, including those working in positions receiving no federal funds, in the interest of consistent treatment of employees.

It should be emphasized that nothing in the Drug-Free Workplace Act requires or encourages drug testing of employees. However, should a local government chose to do so, the recent United States Supreme Court rulings on drug testing should be considered. Those decisions are summarized in the next section of this bulletin.

Supreme Court Rulings on Drug Testing

The United States Supreme Court issued its first rulings on the constitutionality of public employee drug testing in *Skinner v. Railway Labor Executives Association*[9] and *National Treasury Employees Union v. Von Rabb*.[10] These cases are discussed in turn below.

Skinner v. Railway Labor Executives Association

In *Skinner v. Railway Labor Executives Association* a union representing railroad employees challenged as a violation of the Fourth Amendment's prohibition on unreasonable searches[11] certain regulations promulgated by the Federal Railroad Administration (FRA). The regulations mandated blood and urine tests of employees following a major train accident and authorized testing for employees who violate certain safety rules. The regulations were in response to uncontroverted evidence that intoxication and drug use on the job is a significant problem in the railroad industry. In an opinion by Justice Kennedy joined by six other members of the Court, the FRA program was upheld as constitutional.

The Court first examined the question of whether there was sufficient governmental involvement in this matter to implicate the Fourth Amendment. Although the tests were performed on private sector employees by a private employer, the testing was conducted only because the FRA required it. Thus, held the Court, the government did more than adopt a passive position toward the private conduct, but rather encouraged, endorsed, and participated in the drug-testing program to a degree sufficient to implicate the Fourth Amendment.

Turning next to the question of whether blood and urine testing constitute a search under the Fourth Amendment, the Court had no difficulty in concluding that the tests must be deemed a Fourth Amendment search. Addressing blood tests first, the Court stated "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interest."[12] Similarly, the Court found that urine testing constituted a Fourth Amendment search, as "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."[13]

Having determined that drug testing is a search, the Court then examined the question of whether the procedures described by the warrant clause of the Fourth Amendment were applicable. In most criminal cases, the Court noted, a search or seizure may not be made unless a warrant is issued based on a finding of probable cause. The Court has also recognized an exception to the warrant requirement and has allowed a search with probable cause in certain limited circumstances (such as a search of an automobile). The requirement that there be probable cause to search, with or without a warrant, was deemed inapplicable to this case, however, as the government's interest in ensuring safe operation of the railroads presented a "special need" justifying departure from the usual Fourth Amendment requirements.

Even where a warrant or probable cause is not required, Fourth Amendment searches traditionally have been justified only where there is "some quantum of individualized suspicion" to conclude that a search is reasonable.[14] The Court held in this case, however, that not only was there no warrant required to conduct a drug test (and thus no determination of probable cause to believe the person to be tested has violated the law), but no individualized suspicion was required. The Court said:

> [A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.[15]

The Court elaborated on its determination that the railway employees had only a limited privacy interest although the government's interest was compelling. Turning first to the privacy interest of the employees, the Court reasoned that the testing only momentarily interferes with an employee's freedom of movement. Too, the blood test is typical of procedures that are commonplace in physical examinations, with virtually no risk, trauma, or pain. Similarly, the urine collection procedure, which admittedly raises some question of privacy invasion, is done in such a manner as to minimize its intrusiveness (for example, samples are not required to be produced under the direct observation of a monitor). Finally, the employees work in a highly regulated industry, in which drug and alcohol abuse has been documented. Thus the Court held:

> Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures ... pose only limited threats to the justifiable expectations of privacy of covered employees.[16]

In contrast to the limited expectation of privacy of employees, the Court found a compelling government interest in testing without individu-

alized suspicion. The risk to the public of damage caused by impaired employees was great. Further, the requirement of particularized suspicion would make it more difficult for the railroad to obtain the needed information. Finally, the drug testing requirements have a deterrent effect on employees, reasoned the Court, because employees are less likely to use drugs if they know they will be tested in the event of an accident.

The Court thus upheld the FRA drug-testing program as constitutional in light of the "special needs" of the government in this case.

Justice Marshall (joined by Justice Brennan) filed a stinging dissent, criticizing the majority's ruling that drug testing could be required for certain employees absent a showing of individualized suspicion as "join[ing] those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies." The dissent chastised the majority opinion for extending the "special needs" analysis searches of persons, not their possessions, particularly where no showing of individualized suspicion is required:

> [I]n contrast to the searches in *T.L.O.*, *O'Connor*, and *Griffin*, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched, the regulatory regime upheld today requires the postaccident collection and testing of the blood and urine of *all* covered employees—even if every member of this group gives every indication of sobriety and attentiveness.[17]

National Treasury Employees Union v. Von Rabb

The Court also announced its decision in the other drug-testing case in which certiorari had been granted, *National Treasury Employees Union v. Von Rabb*. This case involved a Fourth Amendment challenge to a drug testing program of the United States Customs Service, in which drug tests were made a condition of employment for persons seeking positions directly involved in drug interdiction, positions in which the incumbent carries a firearm, or positions in which the incumbent handles classified material. In the period between May of 1986, when the program was begun, and November of 1988, when the case was argued before the Supreme Court, 3,600 employees were tested; of these, only five employees had positive test results. Nonetheless, as in the railroad workers case, the Court upheld the constitutionality of drug testing, albeit by a much closer vote: again, Justice Kennedy wrote the majority opinion, but he was joined by only four other members of the Court. Justice Scalia filed a dissent in which Justice Stevens joined, and Justice Marshall, joined by Justice Brennan, also dissented.

The majority opinion noted the Court's holding issued the same day in *Skinner v. Railway Labor Executives* that where a search under the Fourth Amendment serves "special governmental needs, beyond the normal need for law enforcement," it is necessary to balance individual privacy interests against governmental interests in order to decide whether a warrant or individualized suspicion is constitutionally required.[18]

As in *Skinner* the Court quickly disposed of the notion that a warrant would be required to test Customs Service employees. Government offices could not function if warrants were mandated, as to do so "would only divert valuable agency resources from the Service's primary mission."[19] Neither, in the Court's view, would a warrant provide additional protection of personal privacy, as the Customs Service employees seeking to transfer to the listed positions know a drug test is required and there is no discretionary determination to search. In other words, "there are simply 'no special facts for a neutral magistrate to evaluate.'"[20]

The Court then identified the compelling governmental interest that outweighed the privacy interest of the employees in drug interdiction and firearms-carrying positions. In the majority's view, because the Customs Service is the "first line of defense"[21] in the war on drugs, whose employees are subject to bribes, threats, and violence, "it is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[22] Similarly, those Customs Service officers who carry firearms must function free from impairment so as to avoid risk to others.

In contrast, the employees in these positions have, in the Court's opinion, a greatly diminished

expectation of privacy. The Court stated, "Unlike most private citizens or government employees in general, employees in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms."[23]

Again, as in the *Skinner* case, the Court upheld the testing absent individualized suspicion of drug use. Acknowledging the fact that "all but a few of the employees are entirely innocent of wrongdoing,"[24] the Court nonetheless concluded that the possible harm resulting from the unknowing promotion of a drug-using employee to one of these positions is sufficiently severe to forgo the requirement of individualized suspicion. A second case of "special needs," allowing a Fourth Amendment search of persons without individualized suspicion, was thus recognized by the Court.

The Court upheld the Customs Service drug-testing requirements, at least insofar as it applied to positions directly involving drug interdiction or the carrying of firearms, as the government's interest in barring persons who were themselves drug users to these positions outweighed the privacy interest of those seeking the positions. The Court remanded the question of the constitutionality of the drug tests as applied to employees in so-called sensitive positions. The lower court was directed to reexamine the criteria used by the Customs Service to determine what constitutes classified material and which employees are tested.

Justice Scalia, joined by Justice Stevens, dissented. Noting that he had joined the majority opinion in *Skinner* because there was a demonstrated problem of frequent drug and alcohol use by railroad workers involved in train accidents, Justice Scalia declined to join the majority in the Customs Service case because there was no showing of any drug use problem by these employees whatsoever. Justice Scalia said:

> In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.... Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards.[25]

Justice Scalia concluded, "[S]ymbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."[26]

Implications of the Court's Rulings

First, in evaluating the effects of the Court's rulings in these cases it is important to remember that in both instances the Court determined that "special needs" were present, which allowed an exception to the long-standing requirement that a Fourth Amendment search be based at a minimum on individualized suspicion. The Court did not hold that all public employees may be required to submit to drug testing; rather, the Court held only that where a compelling government interest can be demonstrated in testing public employees engaged in work in which they have a greatly diminished expectation of privacy, then testing without individualized suspicion may be upheld.

Second, the *Skinner* case may permit a local government employer to maintain a policy requiring drug or alcohol tests of certain employees following their involvement in a vehicle accident. In making this determination, however, close attention should be paid to whether there is evidence of drug or alcohol problems among the employee population to be tested and whether the types of positions involved may be fairly characterized as those in which employees have a diminished expectation of privacy. The Supreme Court recently remanded a case to the United States Court of Appeals for the District of Columbia to determine whether, in light of its recent rulings, school bus drivers who worked in an environment in which drug use was prevalent could be tested.[27]

Third, the *N.T.E.U. v. Von Rabb* case has significant implications for local government em-

ployees engaged in law enforcement. Like the Customs Service workers, law enforcement employees carry firearms and may, indeed, be engaged in drug interdiction from time to time. A local government employer may, in light of this decision, be able to require drug tests for law enforcement applicants or employees seeking initial hiring or promotion, even absent evidence that drug use is a problem among these applicants and employees. Whether a court would uphold testing absent individualized suspicion in these circumstances is not a certainty, however.

Finally, it should be noted that for the majority of public employees, the requirement remains that drug testing be premised on individualized suspicion of drug use, based on evidence supporting the belief that a particular employee is using drugs. How far the courts will go in creating exceptions to this requirement in light of the recent Supreme Court rulings remains to be seen.

Notes

The author is an Institute of Government faculty member whose fields include employment law.

1. 102 Stat. 4305-4308, Pub.L. No. 100-690 (Nov. 18, 1988).
2. 54 Fed. Reg. 4946 (Jan. 31, 1989). These regulations were published as an interim final rule, fully binding after March 18, 1989. The regulations may be amended following the comment period. They are to be codified by various federal agencies in the Code of Federal Regulations as "Subpart F–Drug-Free Workplace Requirements (Grants)."
3. 54 Fed. Reg. 4951.
4. 54 Fed. Reg. 4951-4952.
5. 54 Fed. Reg. 4951.
6. 54 Fed. Reg. 4951.
7. 54 Fed. Reg. 4949.
8. 54 Fed. Reg. 4952.
9. 57 U.S.L.W. 4324 (U.S. March 21, 1989), 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989).
10. 57 U.S.L.W. 4338 (U.S. March 21, 1989), 109 S. Ct. 1384, 103 L.Ed.2d 639 (1989).
11. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."
12. 57 U.S.L.W. at 4328.
13. 57 U.S.L.W. at 4328. The Court noted that all federal courts of appeals that had considered the question had concluded that urine testing constituted a search under the Fourth Amendment. National Treasury Employees Union v. Von Rabb, 816 F.2d 170, 175 (5th Cir. 1987); Lovlorn v. City of Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1143 (3rd Cir. 1988); Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987); McDonnell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Amalgamated Transit Union v. Suscy, 538 F.2d 170, 176 (7th Cir. 1976).
14. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).
15. 57 U.S.L.W. at 4330.
16. 57 U.S.L.W. at 4331.
17. 57 U.S.L.W. at 4333 (Marshall, J., dissenting).
18. 57 U.S.L.W. at 4341.
19. 57 U.S.L.W. at 4341.
20. *Id.*, (quoting South Dakota v. Opperman, 428 U.S. 264, 383 [Powell, J., concurring]).
21. 57 U.S.L.W. at 4531.
22. 57 U.S.L.W. at 4342.
23. 57 U.S.L.W. at 4342.
24. 57 U.S.L.W. at 4343.
25. 57 U.S.L.W. 4345 (Scalia, J., dissenting).
26. 57 U.S.L.W. at 4346.
27. Jenkins v. Jones, 57 U.S.L.W. 3653 (U.S. April 3, 1989).

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