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January 6, 2026

UNDERSTANDING WORKPLACE DRUG TESTING & FOURTH AMENDMENT IMPLICATIONS: A GUIDE FOR EMPLOYERS

Maintaining a drug-free workplace requires a delicate balance between operational safety and legal compliance. For private and public sector employers alike, implementing a drug testing program involves navigating constitutional protections, statutory requirements, and privacy considerations. Failure to adhere to these standards can expose an organization to significant legal liability. In this article we will address how to establish a compliant written policy, types of workplace testing, supervisory and rehabilitation, and lastly general private and constitutional considerations.

Establishing a Compliant Written Policy

A legally sound drug testing policy must prioritize transparency and uniformity. It is required that the policy provides uniform requirements for any disciplinary action resulting from a positive test or a refusal to provide a sample. To prevent claims of discrimination or unfair treatment, all employees in similar situations must be treated the same without exception. Furthermore, this policy must be made readily available to all employees and applicants. The plan must explicitly detail the purpose of testing, the substances being screened, the testing process, employee rights, retesting procedures, and the potential consequences of a confirmed positive result.

Legally, employers may only take adverse employment actions—such as termination or refusal to hire—based on a "confirmed positive" test result that meets or exceeds nationally accepted standards established by the United States Department of Health and Human Services. Adverse actions cannot be based on suspicion, rumor, or preliminary screenings. Additionally, employers are required to provide access to an Employee Assistance Program ("EAP") or equivalent referral services, coupled with a drug-free workplace awareness program that includes educational material about the dangers of substance abuse. If an employee is required to undergo rehabilitation following a positive test, no adverse action may be taken as long as the employee complies with the prescribed treatment.

Standard Categories of Testing and Training

Employers generally utilize specific types of testing to maintain workplace safety. Pre-employment testing is permitted as part of a physical examination, if notice is given to the applicant beforehand. Random testing must be conducted on a periodic basis without advance notice, typically utilizing a computer program for random selection. Reasonable suspicion testing may be implemented when an employer has evidence based on specific, objective, and

articulable facts and reasonable inferences drawn from those facts. These facts might include observable symptoms of impairment, abnormal conduct, reports of use from credible sources, evidence of tampering with a test, or evidence of drug distribution while operating machinery. Furthermore, employers may conduct post-accident testing when investigating workplace incidents that result in injury, as well as rehabilitation testing for employees returning from treatment. To maintain such a program, supervisory personnel must undergo specific training. This includes a minimum of two hours of initial training and one hour of annual subsequent training. This education ensures that supervisors can recognize indicators of substance use, document and corroborate substance abuse disorders, and properly refer employees to the EAP.

Constitutional Protections for Public Employees

Public sector employers face a different legal landscape because they are subject to the United States Constitution.¹ Under the Fourth Amendment, which protects against unreasonable searches and seizures, a drug test administered by a public employer is legally considered a "search".² This is because the collection and testing of a sample intrudes upon a person's reasonable expectation of privacy within themselves and is one that society is willing to recognize as reasonable and legitimate. In order for the fourth amendment to apply certain elements must be met such as requiring that the person has standing, is a protected person, and there was state action. Consequently, the 4th amendment would not apply to a private employer because they are not a state actor, however there are cases in which a private employer can become a state actor such as if they are following the orders of law enforcement or if the influence of a state actor is so strong on the private employer, that they are acting essentially as one of the same.³ However, for a public employer's drug test to be lawful, it must meet the Fourth Amendment's "reasonableness" requirement. This means the search must be reasonable under the circumstances, considering both the nature of the search and its purpose.⁴ It is important to note that what is reasonable for a urine test, for example may not be reasonable for a blood test or hair follicle test, this also depends on the employees' specified duties. For instance if a public employer conducts drug testing incorrectly, it can constitute a constitutional violation and the court must examine whether the employer had a reasonable suspicion under the totality of the circumstances, as such it is important to document everything, and always ask is there special need here?⁵

Privacy and Medical Information

General common law principles recognize medical information as confidential. Invasion of privacy claims are typically governed by a specific legal test: one who invades the right of privacy of another is

¹ A city's interest in the safe, effective, and efficient delivery of public services, without evidence of a concrete danger or serious problem of drug abuse amongst employees, was insufficient to justify suspicion less drug testing of all job applicants. See, *Voss v. City of Key West*, 24 F.Supp.3d 1219 (2014).

² *Kemp v. Claiborne County Hosp.*, 763 F.Supp. 1362 (1991).

³ A case that illustrates this issue well is *Skinner v. Railway Labor Executives' Association* in which after a train derailment a private employer was required by the association under federal law to submit the workers to drug and alcohol testing. Skinner raises a 4thA claim stating that this was an unreasonable search and presumed illegal because they did not have a warrant. While the Court held that in this case the private employer was taking state action, the court held there was no 4thA implications here because of the strong public interest in the safety of the railroads or in other words a "special need" and as such the search was justified. One factor the court looked at in their TOC analysis for whether there was state action was whether the Union could bargain for the striking of testing and they could not; this factor weighed heavily towards state action. *AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al., Appellants, v. Samuel K. SKINNER, Secretary Department of Transportation, et al. Am. Fedn. of Govt. Employees, AFL-CIO v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989).

⁴ The Supreme Court has established a balancing test that weighs the government's interest in conducting the search against the employee's privacy interest, with the analysis depending heavily on whether the testing serves "special needs" beyond normal law enforcement and whether employees occupy safety-sensitive positions. *Bryant v. City of Monroe*, 593 Fed. Appx. 291 (2014).

⁵ *Rodriguez v. City of Chicago*, 370 F.Supp.3d 848 (2019).

subject to liability for the resulting harm. The core elements for an invasion of privacy claim involve a disclosure that is highly offensive to a reasonable person and is not of legitimate concern to the public. There is a specific cause of action for invasion of privacy based on the disclosure of private medical records. However, there are limitations to these protections. For instance, a disclosure may not be considered an invasion if the information has previously been disclosed in a public record. Even if the information is sensitive, it may lose its protected status if it is found in documents not exempt from public record status or if the information is considered newsworthy and of public interest.

Quick Reference and Conclusion

Implementing a robust drug and alcohol testing program is a complex undertaking that requires a thorough understanding of the intersection between employer rights and individual protections. While the goal is to maintain a safe and productive work environment, the legal framework mandates that this objective must be pursued with transparency, consistency, and a high regard for privacy. For private employers, the emphasis is on procedural compliance. Success hinges on a well-drafted, accessible, and uniform written policy. By adhering to federal standards for confirmed positive results and providing access to rehabilitation and education through Employee Assistance Programs, employers can mitigate substance abuse issues while protecting themselves from claims of wrongful termination or discrimination.

For public sector employers, the stakes are elevated to a constitutional level. Because drug testing is classified as a "search" under the Fourth Amendment, it must meet the standard of "reasonableness." This creates a higher burden of proof, often requiring a compelling government interest—such as public safety—to justify testing without individualized suspicion. Finally, the common law protections surrounding medical privacy remind all employers that drug testing results are highly sensitive. Information should only be disclosed when there is a legitimate public concern or a legal requirement; otherwise, employers risk liability for invasion of privacy. By integrating these federal principles and constitutional safeguards into their daily operations, organizations can foster a drug-free culture that remains legally defensible and respectful of the workforce.

Feature	Private Sector Employers	Public Sector Employers
Primary Authority	Statutory requirements and workplace policy.	U.S. Constitution (Fourth Amendment).
Legal Classification	Contractual/Statutory condition of employment.	Deemed a "Search and Seizure."
Justification Required	Compliance with written plan/standards.	Must be "Reasonable" under the circumstances.
Employee Protections	Right to retest and access to EAP/Rehab.	Protection against unreasonable privacy intrusion.
Privacy Standards	Confidential medical records (Common Law).	Constitutional privacy and Public Records laws.

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