LEGAL IMPLICATIONS OF DRUG TESTING IN THE PUBLIC SECTOR

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PRE-EMPLOYMENT TESTING

- Introduction
  - “Search and Seizure”

- Pre-Employment Suspicionless
  - Minimize risk
  - Applicants v. Employees
  - Routine and Entry-Level
  - Middlebrooks v. Wayne County
Pre-Employment Testing

- Knox Co. Education Assoc. v. Knox Co. Board of Education
- Vernonia School Dist. 47J v. Acton
- Chandler v. Miller
- Kreig v. Seybold
- Safety Sensitive Positions
RANDOM DRUG TESTING

- “Special Needs” Cases
  - *Skinner v. Railway Labor Executive Assoc.*
  - *National Treasury Employees Union v. Von Raab*
    - “Special Needs” Test
  - *Harmon v. Thornburgh*
RANDOM DRUG TESTING

- What Constitutes “Special Needs”?  
  - Safety Sensitive Positions Exception  
    - *Saavedra v. City of Albuquerque*  
    - *Hatley v. Department of the Navy*  
    - *Hassell v. City of Chesapeake*  
  - Operation of Public Transportation  
    - Pronounced Drug Problem  
    - Magnitude of Harm  
  - Collective Bargaining Agreements
Reasonable Suspicion
- Under Ohio Administrative Code
- Observable phenomena
- Abnormal Conduct
- Report
- Evidence of Test Tampering
- Information
- Evidence of Usage, Possession, etc.
Reasonable Suspicion based on:

- Nature of Information
- Reliability of Informant
- Degree of Corroboration
- Other Contributing Factors

Copeland v. Philadelphia Police Dept.
“SPECIAL NEEDS” / “REASONABLE SUSPICION”

Case Law

- Skinner and Von Raab
- Pernell v. Montgomery Co. Board of Commissioners
- Morgan Co. Dept. of Human Services v. AFSCME Local 3560
  - Canton, SERB 94-011
  - Findlay City School Dist. Board of Education, SERB 87-031
PRESCRIPTION DRUG ABUSE

- **Epidemic**
  - Third Most Commonly Abused Substance in US
  - Fastest Growing Drug Problem in US

- **Effects**
  - Decreased Productivity
  - Poor Performance
  - Increased Absenteeism
  - Safety Hazards
  - Health Insurance Cost
Top Ten Drugs in OARRS 2013

Source: Ohio State Board of Pharmacy

<table>
<thead>
<tr>
<th>Drug Class</th>
<th>Number of Patients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hydrocodone &amp; Comb.</td>
<td>1,688,511</td>
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<tr>
<td>Oxycodone &amp; Comb.</td>
<td>946,180</td>
</tr>
<tr>
<td>Tramadol</td>
<td>702,801</td>
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<tr>
<td>Alprazolam</td>
<td>384,458</td>
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<tr>
<td>Lorazepam</td>
<td>337,440</td>
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<tr>
<td>Zolpidem Tartrate</td>
<td>290,356</td>
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<tr>
<td>Codeine &amp; Comb.</td>
<td>246,239</td>
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<tr>
<td>Diazepam</td>
<td>198,602</td>
</tr>
<tr>
<td>Amphetamine &amp; Comb.</td>
<td>190,587</td>
</tr>
<tr>
<td>Clonazepam</td>
<td>189,194</td>
</tr>
</tbody>
</table>
Top Pain Prescription

- Hydrocodone

  - Side Effects:
    - Nausea
    - Drowsiness
    - Dizziness
    - Lightheadedness
    - Anxiety, etc.

Source, NCADD

www.ncadd.org
PRESCIPTION DRUG ABUSE

- Facts:
  - 1 in 12 Injured Workers
    - 3-6 months later
  - Health Insurer Costs
    - $72.5 billion
PRESCRIPTION DRUG ABUSE

- Employer Response
  - Direct, Detect, Discipline
  - Drug-Test Each Phase
    - Pre-Employment
    - After Conditional Offer
    - During Employment

- ADA
  - “Discriminate”
PRESCRIPTION DRUG ABUSE

- Cases
  - EEOC v. Dura Auto Systems
  - Bates v. Dura Auto Systems
  - Wells v. CCHMC

- Tests
  - SAMHSA 5
  - 12-Panel
  - Prescriptions
POLICIES

- **What to Include?**
  - Policy Statement
  - Explanation of Reasonable Suspicion
  - Suspicionless-Testing
  - Administering Test Guidelines
    - How / Where to Transport Employee for Collection Site
    - Transport Employee After Test
    - Return to Duty
    - Consequences of Positive Test
    - Remain Off-Duty Timeline
POLICIES

What to Include?
- Testing Method Explanation
  - Intrusiveness of Drug Testing
  - Employer-Paid
  - Clearly Spelled Out Aspects
- Safeguards / Confidentiality
  - Who Receives Results?
  - How Are They Transmitted?
  - Stored?
  - Who is Privy to Outcome?
POLICIES

- What to Include?
  - Statement of Consequences
  - Reference CBA
  - EAP
  - Disclaimer
POLICIES

- Collective Bargaining
  - Mandatory Subject
    - Relates to Terms and Conditions of Employment
  - Arbitration of Discipline
    - “Just Cause”
OFF-DUTY CONDUCT

- Considerations before Discipline
  - “Just Cause”
  - Off-duty Consumption
  - Employers are Free to Deny Employment
  - May not Unilaterally Impalement Testing Policy
Sample Pre-Employment Drug Testing Consent Form

I understand that any offer of employment which may be made to me by the [PUBLIC ENTITY] is contingent upon my successfully passing a Drug Screening Test. I hereby give my consent to [PUBLIC ENTITY] to conduct a drug test that will be performed by a laboratory selected by [PUBLIC ENTITY], and which will provide for split sample testing. I also understand and agree that if the pre-employment Drug Screening Test indicates a violation of the Drug Testing Policy, any contingent job offer which may be or has been made to me will be null and void.

I further agree that in the event that the pre-employment Drug Screening Test indicates a violation of the Drug Testing Policy, I will have an opportunity to challenge this violation before [PUBLIC ENTITY HUMAN RESOURCES DEPARTMENT and/or appropriate department] by submitting a written request to the [APPROPRIATE DEPARTMENT] to review the record. I may submit additional written information that I believe to be appropriate to the [PUBLIC ENTITY] for consideration. Additionally, I may, at my cost, have the split sample referenced above tested to ensure the accuracy of the testing procedure. I understand that the decision of the [PUBLIC ENTITY HUMAN RESOURCES DEPARTMENT and/or appropriate department] shall be final.

Signature of Applicant: ___________________________ Date: __________________
IF YOU HAVE ANY QUESTIONS, PLEASE ASK!

THANK YOU!

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