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LEGAL UPDATE

October 23, 2017

To: **Superintendents/Presidents/Chancellors, Member Community College Districts**

From: **Ellie R. Austin** ERA
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Subject: **When a District May Drug-Test an Employee**
Memo No. 24-2017(CC)

This legal update will address under what circumstances a community college district may require an employee to submit to a drug or alcohol test. This legal update uses the term "drug test" to encompass both drug and/or alcohol tests.

I. May an employer drug test an employee? If so, when?

a. Drug and alcohol testing based on reasonable suspicion is generally permitted.

Drug and alcohol testing by a public agency is generally permitted so long as there is "reasonable suspicion" that the employee is intoxicated on the job. Reasonable suspicion must be based on articulable standards such as, for example:

- Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.
- Apparent physical state of impairment of motor functions.
- Marked changes in personal behavior not attributable to other factors.
- Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected, or employee involvement in a pattern of repeated accidents, whether or not they involve actual or potential injury.
- Violations of criminal law statutes involving the use of illegal drugs, alcohol, or prescription drugs.

We recommend that the above standards, as applicable to your district, be memorialized in district policy and/or the relevant collective bargaining agreement(s). As discussed in Section III below, if a district has an interest in implementing a drug and alcohol testing policy, or changing an existing policy, we

recommend that the district provide notice to the applicable union(s) and an opportunity to bargain.

b. "Suspicionless" or random testing may be unconstitutional depending on the circumstances.

As a general rule, employees have a Fourth Amendment right to privacy regarding their breath, blood, and urine. As such, an employer must have a "legitimate" or "important" reason for drug testing its employees.[1] The employer's interests must be balanced with the employee's constitutional right to privacy.[2] Advanced notice of drug testing decreases an employee's expectation of privacy, and may help an employer beat a constitutionality challenge to suspicionless drug testing.[3]

It is likely a court would find suspicionless drug testing of *every employee* unconstitutional where there is no direct nexus between the nature of the position and the anticipated harm of an employee using alcohol or drugs.[4,5]

c. "Safety-sensitive" positions may be subject to random drug testing where certain criteria are met.

There is an exception to the general prohibition on suspicionless drug testing for positions deemed "safety-sensitive." Whether a position is "safety-sensitive" depends on the "degree, severity, and immediacy of the harm posed" if an employee in one of those positions were under the influence of drugs or alcohol.[6] In other words, where the threat of injury posed by a "single misperformed duty could have irremediable consequences," the job is more likely to be "safety-sensitive," and thus subject to random drug testing.[7]

Employers should consult with legal counsel prior to conducting suspicionless or random drug testing, particularly with regard to represented employees. Determining whether a position is safety-sensitive is based on a case-by-case analysis of the duties of the position. Various courts have described safety-sensitive positions as follows:

- "the risk to public safety is substantial and real"[8]
- where employees serve in positions in which a "single mistake…can create an immediate threat of serious harm to students and fellow employees"[9]

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[1] *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 160, 84 Cal. Rptr. 2d 775 (Cal. Ct. App. 1999).
[2] *Id*. at 158.
[3] *Id*. at 161.
[4] *Loder v. City of Glendale*, 14 Cal. 4th 846, 930 (Ca. 1997), Chin, J. concurring in part and dissenting in part.
[5] Suspicionless pre-promotion testing of every employee has been held unconstitutional by the California Supreme Court. *Loder*, 14 Cal. 4th 846; see also *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (city had no articulable special need to drug test every prospective employee without suspicion).
[6] *Smith*, 72 Cal. App. 4th at 163.
[7] *Smith*, 72 Cal. App. 4th at 163 (citing *Kemp v. Claiborne Cty. Hosp.*, 763 F. Supp. 1362, 1367 (S.D. Miss. 1991)).
[8] *Chandler v. Miller*, 520 U.S. 305, 321 (1997).
[9] *Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361, 367 (6th Cir. 1998) (cited by *Smith*, 72 Cal. App. 4th at 163).

- where an intoxicated employee presents the "potential for serious harm"[10]
- where employees are "responsible for the care and safety of the public"[11]

In addition, the California Department of Human Resources[12] includes a number of positions on its non-exhaustive list of safety-sensitive positions for purposes of drug testing, including but not limited to: administrative assistant, business officer, librarian, school psychologist, site superintendent, teacher, vocational instructor, office assistant, administrator, and transportation coordinator.

Although a number of these positions are specific to the educational setting, a district still needs to undertake the "safety-sensitive position" analysis and abide by its own policies and procedures. Additionally, we recommend consulting with legal counsel prior to instituting random drug testing where there is no relevant policy, procedure, or collective bargaining article in place.

d. Pre-employment, suspicionless drug testing is likely unconstitutional unless the employer can articulate a special need to test prospective employees.

As explained in Legal Update No. 34-2008, pre-employment drug testing is unconstitutional unless the employer can demonstrate a special need which requires screening, beyond the generalized societal problem of drug and alcohol abuse.[13]

II. Does the district need a policy in place to require an employee to take a drug test?

We recommend that employers have a policy in place prior to requiring an employee to take a drug test.

III. Does a requirement to submit to drug testing have to be negotiated with the employees' exclusive representative?

We recommend that drug and alcohol testing and its impact on working conditions be considered negotiable subjects within the scope of representation.[14] As such, if a district has an interest in implementing a drug and alcohol testing policy, or changing an existing policy, we recommend that the district provide the applicable union(s) notice and an opportunity to bargain.

a. Sample contract language

We recommend that a district consult with legal counsel when negotiating any drug and alcohol testing language in a collective bargaining agreement. However, we provide the below sample as a general example of some of this language:

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[10] *Aubrey v. Sch. Bd. of Lafayette Par.*, 148 F.3d 559, 565 (5th Cir. 1998) (cited by *Smith*, 72 Cal.App. 4th at 163).
[11] *Kemp v. Claiborne Cty. Hosp.*, 763 F. Supp. 1362, 1368 (S.D. Miss. 1991) (cited by *Smith*, 72 Cal.App. 4th at 163).
[12] Cal. Dept. of Human Resources, accessed at http://www.calhr.ca.gov/employees/Pages/drug-testing-sensitive-positions.aspx.
[13] *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008).
[14] See, e.g., *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *Holliday v. City of Modesto*, 229 Cal. App. 3d 528, 280 Cal. Rptr. 206 (Cal. Ct. App. 1991); *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995), *opinion amended on denial of reh'g*, (9th Cir. Jan. 30, 1996).

The employer may require a unit member to submit to a drug or alcohol test when the Superintendent or designee has a reasonable suspicion that the unit member is intoxicated in the workplace. Unit members understand and agree that they may be required to submit to a drug or alcohol test when the Superintendent or designee has a reasonable suspicion the employee is intoxicated in the workplace. Reasonable suspicion must be based on factors such as, but not limited to, the following:

- Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.
- Apparent physical state of impairment of motor and other functions, or other indicators of being under the influence.
- Marked changes in personal or professional behavior not attributable to other factors.
- Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected, or employee involvement in a pattern of repeated accidents, whether or not they involve actual or potential injury.
- Violations of criminal law statutes involving the use of illegal drugs, alcohol, or prescription drugs.

IV. What may an employer do if it does not have a policy in place but has an intoxicated employee at the workplace?

If an employer does not have a policy in place relative to drug testing employees, the district must make a case-by-case determination regarding whether to drug test an employee it suspects of being intoxicated at work. The analysis will include whether the employee will drive or has recently driven; whether the employee works in a safety sensitive position; and whether the district has reasonable suspicion the employee is currently intoxicated, such as bloodshot eyes, an aroma of alcohol, slurred speech, or if the employee was seen drinking or imbibing drugs.

In that case, the district may contact law enforcement to come to the scene to make a determination regarding whether a breathalyzer or other drug test is warranted. If law enforcement determines that a breathalyzer or other drug test is warranted, and the employee refuses, the district can likely discipline the employee for insubordination, in accordance with applicable collective bargaining agreement provisions and/or board policies.

If the district decides to involve law enforcement, we recommend discussing in advance that the police should maintain a low profile on campus. For instance, under normal circumstances a police officer should not approach the employee at his/her worksite, but should instead meet the employee in the Superintendent's or designee's office to afford the employee privacy. Nor should the police use their lights when approaching campus, unless it is an emergency.

We also recommend that the district document the employee's poor performance relative to the drug or alcohol use and otherwise follow the applicable policies, procedures, and/or collective bargaining agreement(s) related to discipline.

Recall that subjecting an employee to a drug test without a policy in place and without providing the applicable union(s) with notice and an opportunity to bargain may be found to be a unilateral

change in working conditions, or otherwise unlawful and/or impermissible. In light of this, we recommend negotiating a drug/alcohol testing policy with the applicable unions.

Please contact our office with questions regarding this Legal Update or any other legal matter.