SHAW VALENZA LLP

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: GENE HERNDON

FROM: JENNIFER BROWN SHAW
TIMOTHY REED

DATE: JULY 9, 2012

RE: **PRE-EMPLOYMENT DRUG TESTING**

I.

INTRODUCTION

You asked us about the employment law-related risks associated with Trindel Insurance Fund's ("Trindel") member counties requiring prospective employees to submit to pre-employment tests for illegal drugs.

Both the federal and California Constitution limit public employers' ability to lawfully drug test employees and applicants. Although the California Supreme Court has granted employers broad authority to conduct applicant drug testing, a more recent federal court decision restricts that authority.

To ensure that Trindel's member counties administer pre-employment drug testing that is consistent with both state and federal privacy rights, the members should have a "special need" for the testing (i.e., the positions for which applicant testing is required are "safety-sensitive").

II.

LEGAL DISCUSSION

A. The Constitutions' Privacy Rights and Public Employers

Both the federal and California Constitutions regulate public employers in California. Both Constitutions also protect the privacy of public employees. The Fourth Amendment to the United States Constitution requires that the government respect "the right of the people to be secure in their persons against . . . unreasonable searches and

seizures." Article I, Section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy."

Drug testing by a public employer is considered a "search" under the Fourth Amendment. See Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 616 (1989). Drug testing also implicates the California Constitution's protection of applicants' and employees' privacy. See Loder v. City of Glendale, 14 Cal. 4th 846, 866 (1997). The courts balance the employees' privacy interest against the government's legitimate interests. See Skinner, 489 U.S. at 619; see also Loder, 14 Cal. 4th at 898.

B. Applicant Drug Testing is Generally Permissible Under California Law

The California Supreme Court held in Loder that a government employer lawfully may require all job applicants to submit to drug testing as part of a pre-employment medical examination. The City of Glendale required that all individuals offered new positions with the city – including new hires and city employees approved for promotion to a new position – undergo urinalysis drug testing for a variety of illegal drugs and alcohol. 14 Cal. 4th at 852.

Upholding the city's drug testing of job applicants, the Supreme Court reasoned "urinalysis drug testing of job applicants that is administered as part of an otherwise lawful pre-employment examination represents less of an intrusion on the reasonable expectation of privacy than does drug testing in other contexts." Id. at 897. At the same time, the court decided that testing a bodily substance for personal information about an applicant warranted a "reasonable justification" for the tests. Id.

In examining the "legitimacy and strength" of the city's interest in drug testing job applicants, the court reasoned:

> [B]ecause of the significant problems – absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover – typically posed by an employee who abuses drugs or alcohol, an employer has a legitimate and substantial interest in determining whether or not an applicant currently is engaging in such conduct before the employer finalizes any hiring decision. And because an employer normally has had no opportunity to observe a job applicant over a period of time under circumstances that reasonably might alert the employer to a potential drug or alcohol problem, the employer has a greater need to conduct suspicionless drug testing of job applicants than it does to conduct such testing of its current employees.

Id. The court further noted that "[t]he employer's interest is a significant one, not only because the mistaken hiring of an individual who is abusing drugs or alcohol can impose significant financial burdens on an employer, but also because such an employee's absence

or diminished production frequently will create morale problems within the workplace." Id. at 897-898.

After "[b]alancing the employer's substantial interest in conducting suspicionless drug testing of a job applicant against the relatively minor intrusion upon such an applicant's reasonable expectation of privacy when the drug testing is part of a general pre-employment medical examination," the Loder court "conclude[d] that, as applied to job applicants, the city's drug testing program [did] not violate the privacy provision of the state Constitution."

C. The Federal Constitution Limits Applicant Drug Testing to "Special Needs"

Although Loder authorizes most post-offer/pre-employment drug testing under the California Constitution, a government employer is subject to scrutiny under the United States Constitution as well.

"To be reasonable under the Fourth Amendment, a search [such as an employment-related drug test] ordinarily must be based on individualized suspicion of wrongdoing." Chandler v. Miller, 520 U.S. 305, 313 (1997). However, "particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal needs for law enforcement." Id. at 313-314, citing Skinner, 489 U.S. at 619.

"Special needs" include "concerns other than crime detection." Chandler, 520 U.S. at 313-314. Within the context of drug testing by public employers, the United States Supreme Court has found safety concerns to be a governmental "special need" that outweighs employees' Fourth Amendment protection against unreasonable searches. See Skinner, 489 U.S. at 628 ("The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, likewise presents special needs beyond normal law enforcement . . . ."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668-671(1989) ("We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."); compare Chandler, 520 U.S. 305 at 318 (drug testing of elected officials by State of Georgia unconstitutional because there was "no indication of a concrete danger demanding departure from the Fourth Amendment's main rule").

The U.S. Supreme Court has not applied the above principles to applicant drug testing. But in Lanier v. City of Woodburn, the Ninth Circuit Court of Appeals (the federal appeals court with jurisdiction over California) addressed whether pre-employment drug testing violates the Fourth Amendment. 518 F.3d 1147 (9th Cir. 2008).

Janet Lynn Lanier applied for a position as a page for the public library in the city of Woodburn, Oregon. Id. at 1149. Pages performed tasks such as retrieving books from a book drop and returning them to shelves. Id. They also occasionally staffed the desk in a youth services area that contained materials for teenagers. Id.

The city conditionally offered Lanier the page position. Pursuant to its "Drug and Alcohol Tests" policy, the offer was subject to the completion of a background check and preemployent drug and alcohol screening. Id. Lanier declined to be tested and the city withdrew its offer of employment. Id.

The Ninth Circuit held that the City failed to demonstrate a special need "of sufficient weight to justify an exception to the Fourth Amendment's requirement of individualized suspicion." Id. at 1150. While the court acknowledged the seriousness of the city's concerns – that drug abuse is among society's most serious problems, that drug abuse has an adverse impact on job performance, and that children need to be protected from drug abusers who could influence them to abuse drugs – it noted that "the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal problem that Woodburn has posited." Id. at 1150-51.

D. Limiting Applicant Testing

As stated, public employers must satisfy both the California and federal Constitutions' limits on applicant drug testing. Therefore, public employers should comply with both Loder and Lanier. After Lanier, public employers likely should limit applicant testing to those positions for which the employer may demonstrate a "special need."

The courts most often find "special needs" exist when a position is "safety-sensitive," i.e., a position that "involve[s] work that may pose a great danger to the public." Id. at 1151. The court in Lanier listed examples of safety-sensitive positions, such as those involving the operation of railway cars; armed interdiction of illegal drugs; a nuclear power facility; matters of national security; the operation of natural gas pipelines; the aviation industry; and the operation of dangerous instrumentalities, such as trucks that weight more than 26,000 pounds used to transport hazardous materials or more than fourteen passengers at a time. Id. at 1151-52. Obviously, other jobs could qualify as safety-sensitive. However, the court did not believe that the "library page" position in Woodburn was sufficiently "safety-sensitive" to warrant drug testing without suspicion.

E. Other Legal Considerations

Both the federal Americans with Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA") limit medical examinations of prospective and current employees. However, a drug test is not considered to be a medical examination under the ADA or FEHA. See 42 U.S.C. § 12114(d); Loder, 14 Cal. 4th at 865. Furthermore, although the "ADA and FEHA protect people from who are recovering or who have recovered from a drug addiction[,] they do not protect people who are using illegal drugs when they apply for a job." Lopez v. Pacific Maritime Ass'n., 657 F.3d 762, 765 (9th Cir. 2010).

Therefore, neither the ADA nor FEHA will prevent public employers from conducting applicant drug testing, or from disqualifying applicants who refuse to test or who fail properly administered tests. Employers also are free to disqualify applicants who

test positive for "medical marijuana." See generally Ross v. Ragingwire Telecomm., Inc., 42 Cal. 4th 920 (2008).

California's Confidentiality of Medical Information Act ("CMIA") requires health care providers to obtain an authorization from a patient before disclosing medical information. Loder, 14 Cal. 4th at 859-860. The CMIA provides: "No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization . . . However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part." Cal. Civ. Code § 56.20(b).

The California Supreme Court has held that "so long as an employer-mandated . . . drug testing program is otherwise lawful, [the CMIA] does not prohibit an employer from disqualifying an applicant or employee who refuses to authorize disclosure to the employer of the ultimate results of the test." Loder, 14 Cal. 4th at 862.

F. Options for Pre-employment Drug Testing

Trindel's member counties may require that certain applicants submit to drug testing after being offered employment. However, they should limit drug testing to applicants for safety-sensitive positions, for which failure to properly perform the work may pose a great danger to the public, or other positions for which the clients can show a "special need" to conduct testing. Safety-sensitive positions may include those involving the operation of heavy machinery, firearms, medical treatment, etc. Others may qualify as well. Please let us know if Trindel would like us to address the validity of pre-employment drug testing for any specific position(s).

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We look forward to discussing this memorandum with you at your convenience. Thank you.

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