

Drug/Alcohol Testing of Employees in New Jersey

A number of employers that employ individuals in New Jersey fail to recognize and address various differences in New Jersey law that, if not properly attended to, may significantly increase their exposure to employment-related claims. This document is intended to provide basic information on at least one of those areas of concern — drug/alcohol testing of employees.

New Jersey Law Common Law

There is no statutory regulation of private sector drug testing in New Jersey. The New Jersey Supreme Court in 1992 decided the case of *Hennessey v. Coastal Eagle Point Oil Co.*¹ that has become one of the most-cited authorities on the issue thus far. Until a statute governing private sector drug testing is passed by the New Jersey legislature, employers should take heed of the principles set forth in this seminal decision. *Hennessey* strongly implies that common law privacy rights forbid “random” drug testing in the private sector except for employees in “safety-sensitive” positions. Employees in other positions may be tested only “for cause,” and *all* testing programs must conform to certain procedural “due process” guidelines discussed in more detail below.

The drug testing at issue in *Hennessey* was performed through urinalysis, and the opinion, at least on its face, is limited to that type of testing. In addressing the plaintiff’s invasion of privacy claim, the court noted the perceived threat to privacy posed by the “forced extraction” of a urine sample. The court did not address the issue of whether it would adopt a different standard for testing by other, and

possibly more expensive, means such as hair sampling. Also unanswered is the question of whether the court would impose a lesser standard with regard to breathalyzer tests for alcohol, or the same or greater standard with regard to blood tests for alcohol.

The *Hennessey* court also set out procedural requirements for random testing programs pertaining to safety-sensitive positions, affirming that the public has a compelling interest in safety. Although the *Hennessey* discussion was limited to the specific facts of that case, the procedural protections that are set forth in the decision will most likely be required with respect to all testing programs. The court outlined the following requirements:

- implement a testing procedure that allows as much privacy and dignity as possible;
- provide notice, close in time to the beginning of a testing program but sufficient to provide adequate advance warning, that announces the program, details the method for selecting employees to be tested, warns employees of the lingering effects of certain drugs in the system, explains how the sample will be analyzed, and notifies employees of the consequences of testing positive or refusing to take the test;
- conduct only those tests necessary to determine the presence of drugs in the urine; and
- refrain from disclosing information obtained as a result of testing.²

With respect to a testing procedure that allows as much privacy and dignity as possible (as

¹ 129 N.J. 81 (1992).

² *Hennessey* requires that urine samples be tested only for drugs (and not for diseases or other physical conditions) and that the results be disclosed only on a need-to-know basis.

quoted from *Hennessey*), the U.S. Department of Transportation (DOT) has set out extensive privacy-sensitive guidelines for urine testing by DOT-regulated entities. In any drug/alcohol testing policy, DOT-certified laboratories should be used to collect and analyze the samples in order to meet the court's requirement. Furthermore, the *Hennessey* court requires that urine samples be tested only for drugs (and not with respect to any disease or other physical conditions) and that those results may be disclosed only on a need-to-know basis.

While *Hennessey* dealt specifically with "random" testing of those in "safety-sensitive" positions, it left many questions unanswered. For example, *Hennessey* permitted "random" drug testing of employees in "safety-sensitive" positions, yet *Hennessey* does not define what constitutes "random" testing nor does it clarify what a "safety-sensitive" position is. Generally, the *Hennessey* decision explained that "[i]f the employee's duties are so fraught with hazard that his or her attempts to perform them while in a state of drug impairment would pose a threat to coworkers, to the workplace, or to the public at large, then the employer must prevail." Surely, there are some areas of employment that employers would assume qualify as safety-sensitive, such as forklift and motor vehicle operators.

On the forklift side, an argument could be made that those operators do, in fact, hold "safety-sensitive" positions since the regulations promulgated pursuant to the Occupational Safety and Health Act (OSH Act) require very specific training of employees who operate forklifts and in light of the fact that the Occupational Safety and Health Administration (OSHA) views the failure to properly train forklift operators and the failure to maintain appropriate records of that training as "serious"³ violations of the OSH Act. On the

³ OSHA generally views violations of the forklift training regulations as "serious" since it views there to be a high likelihood of an accident occurring and that there is a substantial

motor vehicle side, the DOT regulations pertaining to drug testing for certain truck drivers require certain types of testing in certain situations, including random testing of commercial drivers of vehicles that exceed a certain weight.⁴ In addition to those positions qualifying as "safety-sensitive,"⁵ there is room to argue that operators of smaller vehicles should also qualify as occupiers of safety-sensitive positions in light of the fact that smaller vehicles can still cause substantial damage to people and property if operated by an alcohol- or drug-impaired individual. However, the New Jersey courts have yet to address these situations or, as noted above, set out any bright line rules for employers to follow.

Adding to the uncertainty is the lack of any express guidance on what constitutes "random," "for cause" or "reasonable suspicion." This lack of clarity leaves undecided the issue of whether a drug/alcohol testing policy applicable to post-accident and post-leave of absence situations is permissible. Although testing in these situations may be permissible, there is some risk associated with making that choice.

Also noteworthy is the decision in *O'Keefe v. Passaic Valley Water Commission*,⁶ a decision issued by the New Jersey Supreme Court in 1993. In *O'Keefe*, the court reemphasized its insistence on express, written notice to employees of any testing program and on the need to balance employee privacy rights with an employer's need for security and performance in the workplace.

possibility that death or serious physical harm could result from the accident.

⁴ The DOT regulations are discussed in more detail later in this article.

⁵ See, e.g., *NJ Transit PBA Local 304 v. NJ Transit Corp.*, 151 N.J. 531 (1997)(citing U.S. Secretary of Transportation guidelines on testing mass transportation workers to support finding of safety-sensitive position).

⁶ 132 N.J. 234 (1993).

With regard to *pre-employment* applicant testing, the New Jersey courts have acknowledged that *Hennessey* does not prohibit such testing.⁷ One justification for this distinction that the courts have adopted - regardless of its merits - is that job applicants have some lesser privacy rights than those of current employees.⁸ That being said, applicant testing programs should be in *writing* and applicants' signed consent forms (they need to be HIPAA compliant as well) should be obtained prior to any testing. Additionally, it is more likely that a court would uphold the performing of applicant testing if *Hennessey's* procedural requirements are met.

Discrimination Laws

The New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 *et seq.*, prohibits discrimination against "handicapped" individuals, a term broadly defined in the law.⁹ The New Jersey Supreme Court has ruled that alcoholism is a handicap protected under the NJLAD¹⁰ but has yet to address the issue of addiction to illegal drugs. Notably, a New Jersey Attorney General opinion holds that illegal drug use is not a covered handicap, reasoning that NJLAD cannot compel or authorize any act prohibited by law.¹¹ However, the New Jersey Appellate Division has held that while current illegal drug use is outside the definition of "handicap," rehabilitated drug addicts who no longer engage in illegal drug use do fall within

the protection of the NJLAD prohibiting discrimination on the basis of a handicap or a perceived handicap.¹²

Of course, the NJLAD does not protect employees whose drug addiction or alcoholism impairs their job performance. The law prohibits only discharge or discipline that is based on the fact of an employee's substance abuser status. A "for cause" testing program is not likely to contravene the discrimination laws, since such a program would (or should) be keyed to an individual's actual job performance.

Although many drug/alcohol testing programs do not always require individualized suspicion (i.e., in post-accident or return-to-work situations), there may be a heightened risk under the NJLAD. If, however, there is an offer of rehabilitation for the first offense (although not specifically required under the NJLAD), such a component would go a long way in meeting the law's requirement that employers make "reasonable accommodations" for handicapped employees.¹³ Accordingly, there are additional components of any drug/alcohol testing program that warrant investigation before a program is implemented.

In addition, as the New Jersey Appellate Division cautioned in *A.D.P. v. ExxonMobil Research and Engineering Co.*,¹⁴ requiring self-identified alcoholics to submit to random alcohol tests absent an individualized analysis is a violation of NJLAD. In *A.D.P.*, the Appellate Division held that an employer's policy of randomly testing and monitoring employees who returned to work from a drug or alcohol rehabilitation program as part of an after-care contract with the employer was facially

⁷ *Vargo v. National Exchange Carriers Association, Inc.* 376 N.J. Super. 364, 377 (App. Div. 2005) (a prospective employee's waiver to undergo a drug test negated an invasion of privacy claim); *see also Martin v. Quick Check Corp.*, 2012 WL 127530 (App. Div. 2012) (in a case where an employee failed a mandatory post-accident drug test because of his use of a non-prescribed pain medication, explaining that "NJLAD is not offended by a private company's lack of compassion" stemming from the termination of an employee for failing a drug test regardless of any mitigating circumstances concerning the positive test findings).

⁸ *See Jevic v. Coca Cola Bottling Co. of New York, Inc.*, 1990 WL 109851 (D.N.J. June 6, 1990) (holding that there was no violation of a federal constitutional right to privacy, in part, because plaintiff expressly consented to take a pre-employment drug test).

⁹ N.J.S.A. 10:5-5(q).

¹⁰ *Clowes v. Terminix International, Inc.*, 109 N.J. 575 (1988).

¹¹ N.J. Formal Opinion No. 1-1989, 1989 WL 505800 (N.J.A.G.).

¹² *Bosshard v. Hackensack University Medical Center*, 345 N.J. Super. 78 (App. Div. 2001); *see also In re Daniel Cahill*, 245 N.J. Super. 397 (App. Div. 1991). The federal Americans With Disabilities Act (ADA), like the NJLAD, broadly prohibits discrimination against the handicapped, but the ADA expressly excludes current illegal drug use as a protected handicap.

¹³ *See* N.J.A.C. 13:13-2.6.

¹⁴ 54 A.3d 813 (App. Div. 2012).

discriminatory under NJLAD. The court, however, did not go as far as proscribing post-rehabilitation random testing altogether. Drawing from guidance provided by the United States Equal Employment Opportunity Commission, the court favorably cited the following factors in determining whether an employee who returns to work from a rehabilitation program should be subject to periodic alcohol testing:

- the safety risks associated with the position the employee holds;
- the consequences of the employee's inability or impaired ability to perform his/her job functions, and how recently the event(s) occurred that cause the employer to believe that the employee will pose a direct threat (e.g., how long the individual has been an employee, when he or she completed rehabilitation, whether he or she previously has relapsed);
- the duration and frequency of the testing must be designed to address particular safety concerns; and
- In the event that an employee has repeatedly tested negative, continued testing may not be "job-related and consistent with business necessity" as the employer may no longer have a reasonable belief that the employee poses a direct threat.

In short, follow-up drug and alcohol testing for employees who have completed rehabilitation programs can be an effective tool but must be narrowly tailored to an employee's personal circumstances.

Drug Testing and Unemployment Benefits

In New Jersey, employees may be disqualified from receiving unemployment benefits on the grounds of failing or refusing to take an employer drug test, which qualifies as simple

workplace misconduct.¹⁵ However, an employer must have a written drug test policy that has been conveyed to its employees for this disqualification to be rendered effective.

New Jersey Medical Marijuana Law

Like a growing number of jurisdictions, New Jersey has passed a medical marijuana statute, entitled the New Jersey Compassionate Use Medical Marijuana Act.¹⁶ However, nothing in the law requires an employer to accommodate the medical use of marijuana in any workplace, including to patients who are officially registered in the State program. Marijuana use, both medicinal and recreational, remains illegal under federal law and, consequently, employers may continue to proscribe its use through lawful workplace drug testing policies.

Federal Law

The Drug-Free Workplace Act

The Drug-Free Workplace Act (DFWA)¹⁷ is a federal law that applies only to federal contractors holding contracts worth in excess of \$100,000 and to all recipients of federal grants. The DFWA requires, among other things, that covered organizations promulgate certain no-drug policy statements, requiring employees to comply with the same and impose a penalty on, or require satisfactory participation in, a drug abuse assistance or rehabilitation program by any employee convicted of a reportable workplace drug conviction. The failure by an organization to comply with the DFWA may result in, among other penalties, the suspension of payments for contract or grant activities or, more dramatically, the suspension or termination of the contract or grant itself. It should be noted, however, that nothing in the DFWA mandates covered organizations to establish an Employee Assistance Program or implement a drug-testing program.

¹⁵ N.J.A.C. 12:17-10.8.

¹⁶ N.J.S.A. 24:6l-1, *et seq.*

¹⁷ 54 Fed. Reg. 4946.

Federal Acquisition Regulations Supplement

The Department of Defense (DOD) has special requirements for contracts issued after October 31, 1988, pursuant to the Federal Acquisition Regulations Supplement (DFARS).¹⁸ All contracts subject to DFARS are mandated to include a provision obligating the contract to establish a program for drug testing employees in “sensitive positions” (e.g., positions involving classified information, national security, health or safety). Under DFARS, the contractor must establish a drug testing policy, consistent with applicable state laws and any relevant collective bargaining agreements, based on the nature of the work performed under the contract, the employee’s job duties and risks to health, safety or national security, among other factors.

Department of Transportation Regulations

As noted previously, there are specific and detailed DOT regulations (49 C.F.R. Part 382) pertaining to drug and alcohol testing for certain truck drivers.¹⁹ Specifically, the regulations apply to every person who operates a commercial motor vehicle in commerce and their employers, and is subject to the commercial driver’s license requirements of 49 C.F.R. Part 383. A “commercial motor vehicle” is defined as, among other things, a vehicle having a gross vehicle weight rating or gross combination weight rating of 26,001 or more pounds.²⁰ “Motor carrier” is defined to mean a “for-hire motor carrier or a private motor

carrier of property.”²¹ Motor carriers running the above-described vehicles in interstate and intrastate commerce come within the scope of the regulations.

The DOT requires pre-employment, reasonable suspicion and random testing.²² In addition, drivers must be tested after an accident, upon return to work and for follow-up testing.²³ For the purposes of post-accident testing, an accident is defined as any incident involving a fatality, an injury treated away from the scene or when a vehicle is required to be towed from the scene.²⁴ The regulations require that a driver who refuses testing be disqualified from driving a motor vehicle.²⁵ The regulations also require that employers advise employees engaged in prohibited conduct of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and controlled substances, including names, addresses and telephone numbers of substance abuse professionals and counseling and treatment programs.²⁶

Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) requires, with certain exceptions not relevant here, that employers provide employees with up to 12 weeks of leave for, among other things, the employee’s own serious health condition. The final regulations implementing the FMLA provide that “substance abuse” may be a “serious health condition” and that a covered employer may be required to grant a leave of absence for treatment where the abuse problem is serious enough to require hospitalization or other

¹⁸ 48 C.F.R. §§ 201, *et seq.*

¹⁹ See 49 C.F.R. § 382.211 (“No driver shall refuse to submit to a pre-employment controlled substance test required under § 382.301, a post-accident alcohol or controlled substance test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substance test required under § 382.307, a return-to-duty alcohol or controlled substances test required under § 382.309 or a follow-up alcohol or controlled substance test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.”).

²⁰ 49 C.F.R. § 382.107.

²¹ 49 C.F.R. § 397.65.

²² 49 C.F.R. §§ 382.301, .307 and .305, respectively.

²³ 49 C.F.R. §§ 382.303, .309 and .311, respectively.

²⁴ See 49 C.F.R. § 382.303.

²⁵ 49 C.F.R. § 382.311.

²⁶ 49 C.F.R. § 382.605. In late 1993, New Jersey adopted these, and other, DOT regulations, so that they are now enforceable on the state level as well.

continuing treatment.²⁷ Accordingly, any policy should specify that such leave is available.

The National Labor Relations Act

The National Labor Relations Board has held that a company's duty to bargain under the National Labor Relations Act (NLRA) requires that the employer offer to bargain with its union before implementing a drug testing program for current employees, unless the testing is mandated by law.²⁸ However, an employer may institute a drug testing program for applicants unilaterally.²⁹

The NLRA requires only that the union be given the opportunity to bargain over changes in terms and conditions of employment. If the union is given notice of a proposed change and does not respond, it waives its right to bargain on the matter.³⁰ Even if the union does seek bargaining, it cannot completely block the implementation of the plan under the NLRA. The NLRA requires only that the parties bargain in good faith. Once impasse on the issue has been reached, an employer is free to implement its proposal.³¹

Americans With Disabilities Act

The Americans With Disabilities Act (ADA) prohibits discrimination against handicapped individuals, and its reach extends to drug and alcohol testing in the employment context. Employers may require physical examinations under the following circumstances consistent with Title I of the ADA:

1. A medical examination is permitted following a conditional offer of employment

if all entering employees in a particular job category are subject to the same physical examination requirements;

2. "Fitness-for-duty" examinations are permitted to determine if an employee still can perform the essential functions of the job and to determine what reasonable accommodation(s), if any, may be required; or
3. Voluntary medical examinations are permitted that are part of on-site employee health programs (e.g., "corporate wellness programs").

Once a conditional job offer has been made, an employer may request that the prospective employee undergo an unrestricted physical examination. However, the employer cannot refuse to hire the individual based upon the results of the exam unless the decision is based on a legitimate business necessity or job-relatedness.

Drug tests generally fall into a category other than medical examinations under the ADA. Generally speaking, an employer may require applicants for employment to submit to a pre-employment drug (and alcohol) test.³² Alternatively and possibly more practically, an employer can make a job offer contingent upon the successful completion of the pre-employment physical and a drug/alcohol test.³³

Occupational Safety and Health Act

The U.S. Supreme Court has long held that mandatory post-accident alcohol and drug testing policies are a crucial deterrent to alcohol and drug use by individuals employed in safety-

²⁷ 29 C.F.R. § 825.119.

²⁸ *Johnson-Bateman Co.*, 295 NLRB No. 26, 131 L.R.R.M. 1393 (1989).

²⁹ *Star Tribune*, 295 NLRB No. 63, 131 L.R.R.M. 1404 (1989).

³⁰ *United States Lingerie Corp.*, 170 NLRB 750, 67 L.R.R.M. 1482 (1968).

³¹ See *Massey v. Ferguson, Inc. v. NLRB*, 78 L.R.R.M. 2289 (7th Cir. 1971), *enfg*, 184 NLRB 640, 74 L.R.R.M. 1565 (1970).

³² 42 U.S.C. § 12114(d).

³³ The Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs run by federal agencies, programs that receive federal financial assistance, programs in federal employment, and in the employment practices of federal contractors, is applied in a manner identical to the ADA and permits workplace drug and alcohol testing within the same legal framework.

sensitive positions.³⁴ Recently, OSHA promulgated a new rule, to be effective November 1, 2016, that would limit the authority of an employer to conduct post-accident drug and alcohol testing.³⁵ Reasoning that mandatory testing has a chilling effect on the reporting of injuries or illness in the workplace, OSHA promulgated the new rule to prohibit employers from discharging or discriminating against employees for reporting work-related injuries or illness. Toward this end, OSHA has declared unlawful “blanket post-injury drug testing policies” because they “deter proper reporting” and, as such, drug-testing, alone, will now constitute an unlawful “adverse employment action” subject to prosecution by the agency. Employers should be prepared to revise their post-accident testing policies to “situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment by drug use.” Going forward, by way of illustration, the reporting by an employee of a bee sting, a repetitive strain injury or an injury triggered by the absence of a machine guarding or a machine or tool malfunction will not justify mandatory post-accident drug testing. An individualized analysis will be required under the new rule.

Testing Only Certain Classifications of Employees

Some employers choose to test only certain classifications of employees. Employers making that choice should tread carefully. If the job classifications designated for testing are predominantly occupied by employees in a protected class, there is the threat of discrimination claims even if the program adheres to the *Hennessey* court’s directives. That said, an employer that has a sufficient business justification may survive a challenge of

a drug/alcohol testing program aimed at current employees in certain designated groups. For example, the testing of mechanics only may be based on the fact that they handle heavy equipment and service vehicles which, if improperly used or repaired, could cause harm to the employee himself or to others. A similar analysis could be made as to the sales people as they may operate a vehicle while a customer is in it.

NJLAD regulations support the conclusion that testing need not be imposed upon all groups of employees. New Jersey law permits employers to require post-offer, pre-hire medical examinations; job offers may be made contingent upon the examination results. If used, these examinations must be given to all job offer recipients for jobs in the same category.³⁶ Although the regulations do not define the scope of pre-hire medical examinations, we believe that a drug/alcohol screen could legitimately be part of the exam.³⁷

Most employers using drug/alcohol screening have imposed their testing programs across the board both for morale purposes and to avoid any appearance and risk of discrimination claims. Although such programs may be more costly initially with respect to applicant testing, many employers find them worthwhile in the long run in eliminating substance abusers from the workforce and concomitantly reducing insurance cost, sick time and workers’ compensation claims. Moreover, given *Hennessey*’s “injunction” against random testing in most cases, the increased costs of across the board testing may be negated somewhat by the “for cause” requirement.

This document covers a great deal of information. In order to apply it practically,

³⁴ *Skinner v. Railway Labor Executives’ Association*, 489 US 602 (1989).

³⁵ 92 Fed. Reg. 29624.

³⁶ See e.g., N.J.A.C. 13:13-2.4(e).

³⁷ Cf. *Jevic*, *supra*. (tests for illegal drugs are not medical examinations under the ADA and, therefore, are not subject to the restrictions on such examinations).

employers need to focus on the following questions, among others:

1. What testing policies, practices and testing procedures are currently in place, if any? Are they scientifically sound?
2. Which employees is the policy intended to apply to, and what are their job duties (in terms of potential safety-sensitive positions)?
3. To the extent any of the covered employees are subject to a collective bargaining agreement, to what extent has the subject of drug and alcohol testing been bargained over, resulting in either a discrete policy on the subject or the absence of any such policy?

4. Whether employees are subject to blanket post-accident alcohol and drug testing policies?
5. To the extent that there exists an after-care program for employees returning to work from drug or alcohol rehabilitation, what, if any, are the post-rehabilitation testing requirements?

Employers that desire to implement drug and/or alcohol testing procedures should consult with legal counsel prior to the preparation and implementation of these procedures so that the procedures developed comply with then-existing legal requirements.

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