

## **EMPLOYMENT LAW**

### **Why are certain employees subject to random drug testing under the League Non-CDL policy while other employees and city council members are not?**

First, bear in mind that all city employees may be tested if a trained observer (such as a supervisor) has reasonable suspicion that the employee is under the influence of drugs or alcohol. However, when it comes to random drug testing, the courts make a distinction between safety or security sensitive employees on the one hand and “run of the mill” employees on the other.

This distinction is based on the fourth amendment of the U.S. Constitution, which forbids unreasonable searches by the government (including local governments). The Supreme Court has ruled that a drug test is a “search” of the person’s body under the fourth amendment. Therefore, it must be reasonable in order to be constitutional. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989). (Please note that the fourth amendment only applies to governments and their agents, not to private industry, which is why random drug testing is allowed in the private sector).

The Supreme Court has held that a drug test can be a reasonable search only under the following circumstances:

- 1) There is a reasonable, individualized suspicion to believe that the employee is under the influence;
- 2) The employee performs a safety-sensitive job;
- 3) The employee performs a security sensitive job (normally law enforcement).

The general rule is that there must be reasonable suspicion. This is similar to the “probable cause” standard police must satisfy in order to conduct a search, although it is an easier standard to meet. Random testing is done without any individualized suspicion whatsoever, and therefore it would violate an employee’s constitutional rights.

However, the Supreme Court found that in certain cases, government has a “special need” to conduct drug testing, and so created the safety and security sensitive exceptions to the reasonable suspicion requirement. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

The safety sensitive category is not easy to define, but basically involves employees who, if they have a momentary lapse of attention, could create a danger of physical harm or death to themselves or the public. This has been developed on a case-by-case basis by courts around the country, and the results are not always consistent. (There are no published cases from Arkansas or the federal Eighth Circuit, where Arkansas is located). Thus, we have taken our “best guess” of what the courts in our jurisdiction might uphold. The “security sensitive” category applies to law enforcement officers and police department employees who might have access to confidential information that could jeopardize criminal investigations.

Thus, the categories permitted in the League policy are those which have been upheld by the courts. Council members are not randomly tested because, again, their jobs are not safety or security sensitive. The Supreme Court has specifically ruled that candidates for state office were not subject to drug testing, and the same reasoning would apply to city officials. *Chandler v. Miller*, 117 S.Ct. 1295 (1997).