Status of Random Drug Testing in Florida

By M. Allison Hunnicutt, Esq. with Marks Grey

Florida and federal drug testing laws generally allow employers to test employees "for cause"—such as when there is a workplace accident or when an employee acts in a way that suggests drug or alcohol impairment. That's fine as far as it goes—some employers want zero tolerance. What about random testing?

In 1988, Congress passed the Drug-Free Workplace Act ("DFWA") to ensure employers could provide drug-free and safe workplaces while maintaining the constitutional rights of employees. In 1990, Florida followed Congress and enacted the Florida Drug Free Workplace Act, which is codified in sections 112.0455 and 440.102, *Florida Statutes*.

Under Florida and federal laws, there is virtually no limitation at all on the right of private employers to adopt drug and alcohol testing policies for their workers. Public employers must contend with the Fourth Amendment. Under the Fourth Amendment, courts generally will uphold suspicionless, random drug testing when the job entails safety sensitive requirements or special risks, as defined in chapter 110, Florida Statutes. When there are no safety sensitive or special risk designations, public employers may test only for cause, when there is a reasonable suspicion that an employee may be impaired. Union contracts, of course, also may contain restrictions on drug testing.

Any—private or public—employer's primary concern regarding drug testing is fear of violating the employees' constitutional right to privacy or the state and federal statutes. The laws are fairly uncomplicated and easy to comply with—if the employer knows what to do and not do. Here are just a few of Florida's many Drug-Free Workplace program requirements:

- Notice – One-time only, prior to testing, an employer shall give all employees or job applicants for employment a written policy statement which contains a general statement of the employer's policy on employee drug use which includes types of testing, actions the employer may take against an employee who tests positive. F.S. §440.102(3)
- Notice must be given at least 60 days prior to commencing a drug-testing program for a drug-testing program instituted after 1990. F.S. §440.102(3)(b)
- An employer shall include notice of drug testing on vacancy announcements for a position for which drug testing is required. F.S. §440.102(3)(c)
- A sample shall be collected with due regard to the privacy of the individual providing the sample. F.S. §440.102(5)(a)
- Within 5 working days after a positive confirmed test result, an employee or job applicant may submit information explaining or contesting the result, and explaining why the result is not a violation of the policy. F.S. §440.102(5)(i)
- An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or applicant based on a positive test result without confirmation by a medical review officer. F.S. §440.102(5)(k)
- An employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered a drug rehabilitation program. F.S. §440.102(5)(n)
- If an employee or job applicant refuses to submit to a drug test, the employer may discharge or discipline the employee or refuse to hire an applicant. F.S. §440.102(7)(f)
- Confidentiality – Except to administer a drug-free policy or assert a defense under Chapter 440, all information obtained from drug-testing programs is confidential. No information about drug-test results may be released without the signed consent of the person tested. F.S. §440.102(8)(a)
- Employees in safety-sensitive or special-risk positions are subject to leave restrictions and reassignment if they enter an assistance program. An employee in a special-risk position may be disciplined for the first positive confirmation for the presence of certain illicit drugs F.S. §440.102(11)

Some of the pitfalls to avoid are:

- Make sure you have posted the appropriate notice of your drug-testing policy. Follow the statute to the letter.
- Make sure the medical testing lab you retain is extremely well-versed in the very detailed chain of custody, testing and other requirements of Florida's DFWA.
- Check with counsel before you terminate any employee for violation of your drug-free policy, especially when an employee is taking prescribed medication. You may create risk of liability under the Americans with Disabilities Act, if you proceed with termination.
- Apply your drug-testing policy across the board to all employees and do not single out groups of employees by race, gender, age, etc., or be prepared to face discrimination lawsuits.
- Keep drug-testing information confidential to reduce the risk of liability for slander.
- Delegate the testing procedure to a medical lab. If you collect samples on the work site, you create more risk of liability.

Meanwhile, the scope of the state's ability to test public employees remains a hot topic for Governor Rick Scott.

On March 22, 2011, Governor Scott signed Executive Order 11-58 mandating two types of suspicionless drug testing: random testing of all employees at state

continued on page 17

continued from page 16

agencies within his control (approximately 85,000 individuals), and pre-employment testing of all applicants in those agencies.

The state employees' union—American Federation of State, County, and Municipal Employees Counsel 79—sued the Governor in the Southern District of Florida to invalidate the Executive Order as unconstitutional under the Fourth Amendment when applied to employees not occupying safety sensitive positions, which encompasses roughly 60% or 51,000 of the 85,000 employees at state agencies under the Governor's control. American Federation of State, County and Municipal Employees Council 79 v. Rick Scott, 2013 WL 2321383 (11th Cir. 2013).

The district court invalidated the Executive Order. On May 29, 2013, the 11th Circuit Court of Appeals reversed the district court and remanded the case in order to allow the State to "meet its burden of demonstrating important special needs on a job-category-by-category basis." Partly as a result, the 2012 Legislature amended Florida's DFWA to permit random suspicionless testing of all state employees at three-month intervals.

In reversing the district court, the 11th Circuit noted "the State wants us to approve a drug testing policy of far greater scope than any ever sanctioned by the [United States] Supreme Court or by any of the [United States'] courts of appeal." The 11th Circuit further noted that "the Supreme Court has approved suspicionless drug testing only when the government has demonstrated heightened interests, such as a serious threat to public safety, that apply narrowly to specific job categories of employees."

The State argued the Executive Order was reasonable and therefor constitutional because "employees have consented to the testing requirement rather than quitting their jobs." The 11th Circuit found this argument implausible and stated "we do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law."

The State was likewise unable to show an existing drug problem within the affected state agencies. The 11th Circuit noted that "the worst result the State obtained was when 2.5 percent of the Dept. of Corrections' employees tested positive in 2011." The appellate court saliently noted "[t]his hardly demonstrates the existence of a serious drug problem" when "the State itself submitted a 2010 national survey [which] indicated that 8.4 percent of full-time employees nationwide were illicit-drug users."

Governor Scott continues to argue that all state workers should be tested for drug use and continues to push his case in the courts.

At last check, no substantive motions or pleadings had been filed with the Southern District Court to which the case was remanded by the 11th Circuit Court of Appeals. Stay tuned!

***

M. Allison Hunnicutt is a shareholder at Marks Gray, P.A. She practices primarily in the areas of workers' compensation and employment law.

Welcome New Members!

Mark Austin
CSX Corporation

Kenneth Charron
Genesee & Wyoming Inc.

Charles Cranford
Fidelity National Information Services, Inc.

John Germany
Fidelity National Information Services, Inc.

Ryan Johnson
MarkOne Holdings, LLC

Genie Key
Fidelity National Information Services, Inc.

Daniel Knight
Lender Processing Services, Inc.

Kimberly Law
The Main Street America Group

Charles Richardson
Baptist Health System

Anne Julie Ruvane
Attorney