



## DRUG TESTING IN THE WORKPLACE AND IN PUBLIC SCHOOLS

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### BY THE NUMBERS

A survey conducted by the Society for Human Resource Management in 2011 found 36% of employers tested their employees for illegal drugs. The survey found that whether large companies test employees may depend on whether they are required to do so by law.

### QUESTION

What is the law controlling drug testing of employees in the workplace and students in public schools?

### SUMMARY

Among the various types of employee drug testing conducted, four categories stand out as the most common:

1. pre-employment testing is conducted prior to hiring a new employee to prevent hiring people who use illegal drugs;
2. reasonable suspicion testing is conducted when the employee's supervisor observes signs, symptoms, or other unusual behavior sufficient to justify a reasonable belief that the employee is under the influence of drugs or alcohol;
3. post-accident testing is conducted following a workplace accident to determine whether drugs or alcohol contributed to the event; and
4. random testing is conducted in an unannounced and unpredictable manner and, in part, is intended as a deterrent to drug use.

Connecticut law generally prohibits private-sector employers from requiring employees to undergo random drug tests unless the state labor commissioner has designated their occupations as high-risk or safety-sensitive. If a job does not fall into this category, an employer must have a reasonable suspicion that the employee is under the influence of alcohol or drugs and that it is affecting, or could affect, his job performance before he may require a test. The test itself must be conducted according to specified requirements. Employers may also test prospective employees as long as the tests meet the requirements and applicants are notified ahead of time.

Generally, state and municipal employees are not covered by the state law but are protected by the Fourth Amendment to the U.S. Constitution, which prohibits the government from carrying out unreasonable searches (there are exceptions to this that are addressed below). The U.S. Supreme Court has ruled that urine tests are searches and that the Fourth Amendment applies to governments acting as employers. The Court has also ruled that probable cause or individualized suspicion is not always a prerequisite for testing to be reasonable. Instead, it requires a weighing of the urgency of the government's need to carry out the drug testing against the individual's privacy rights.

Federal law and regulations require interstate operators of commercial vehicles over a certain size, including state and municipal employees, to undergo drug tests before they are hired, after serious accidents, and when there is a reasonable suspicion that they are under the influence of drugs. The General Assembly has extended these federal requirements to intrastate operators of commercial vehicles and also allows employers to test operators of smaller vehicles, mechanics who service commercial vehicles, and forklift operators.

The state government requires pre-employment drug testing only for correction officers, state police, and certain other high-risk executive branch jobs, such as job types listed as high-risk or safety-sensitive by the state Department of Labor (DOL). Once an employee is working, tests are allowed only on the basis of reasonable suspicion, if at all. State and municipal employees who have to hold commercial drivers' licenses (CDLs) to do their jobs are covered by the federal and state transportation drug testing requirements.

In the private sector, pre-employment drug testing is fairly common. There are no good figures on how widespread current employee testing is among Connecticut employers. However, recent national surveys show about 36% of companies nationwide employ some form of post-employment testing.

There are no federal or state statutes that cover drug testing of students in public schools. Students do not have the same level of constitutional rights as adults and a 2002 U.S. Supreme Court decision permits schools to conduct random drug testing of students who participate in extracurricular activities. But, according to the State Department of Education, drug testing cannot be a condition for attending school or for participating in school-related activities mandated by law.

## **STATE LAW AND WORKPLACE DRUG TESTING**

### ***Drug Testing Law***

State law limits the power of private-sector employers to order drug testing of current, former, and prospective employees (CGS §§ [31-51t](#) to [31-51aa](#)).

### ***Current Employees***

An employer may not require an employee to undergo a drug test unless the employer has a reasonable suspicion that the employee is under the influence of drugs or alcohol and that it has or could adversely affect the employee's job performance. Although the law requires the labor commissioner to define "reasonable suspicion" by regulation, the commissioner has not done so.

Employers may also require random drug tests in the following cases:

1. when such tests are allowed by federal law;
2. when the employee serves in an occupation which has been designated as a high-risk or safety-sensitive occupation as defined by DOL regulations;
3. when employment involves operation of a school bus or student transportation vehicle; or,
4. the test is part of an employee's voluntary participation in an employer-sponsored or authorized employee assistance program.

Additionally, an employer is prohibited from making any adverse personnel decision based on a positive drug test unless the employer uses a reliable testing procedure and the positive result is confirmed by a second test. The second test must be done using either a gas chromatography and mass spectrometry (GC/MS) method or another method the state health commissioner determines is equally or more reliable. Drug test results must be kept confidential and are part of the employee's medical records. They cannot be used in any criminal proceedings, and no employer or agent may watch while the employee produces a urine specimen for testing.

### ***Prospective Employees***

Employers may require prospective employees to submit to drug tests as part of the application procedure only if (1) the prospective employee is informed in writing at the time he applies that the employer intends to conduct a drug test; (2) the test is conducted, as described above, by certain reliable methods and is subject to confirming tests; and (3) the applicant is given a copy of the test results. All prospective employee test results must be kept confidential.

### ***Former Employees***

Former employees who reapply for jobs with their previous employer may be subjected to a drug test in the same manner as other prospective employees when the previous employment period terminated more than 12 months earlier. When reapplying within 12 months of terminating a previous period of employment with the prospective employer, the former employee may not be tested unless the employer has a reasonable suspicion that the former employee is under the influence of drugs or unless they are seeking a high-risk or safety-sensitive job.

### ***Gaming Employees***

Urinalysis drug testing programs, supervised by the Department of Consumer Protection, may be conducted on gaming participants, including jai alai players, jai alai court judges, jockeys, harness drivers, and stewards participating in activities on which pari-mutuel betting is allowed by state law.

### ***Workplace Bans on Intoxicating Substances***

The employee drug testing laws expressly permit employers to prohibit the use of intoxicating substances during work hours and to discipline an employee for being under the influence of intoxicating substances during work hours.

### ***Medical Screenings***

Restrictions on employee drug testing do not include medical screenings to monitor exposure to toxic or unhealthy substances on the job. These tests require the employee's express written consent. The consent must identify the specific substances for which the employee is to be screened and tests are limited to those substances.

### ***Enforcement***

The employee drug testing laws provide employees with remedies for employer violations. The employee may seek an injunction to prevent violations as well as general damages, special damages, and attorney fees and litigation costs. The law authorizes suits for injunctive relief by any aggrieved person, the attorney general, or by a class representative in a class action.

### ***High-Risk and Safety-Sensitive Jobs***

As of February 2014, the labor commissioner had designated 370 jobs as high-risk or safety-sensitive under the state drug testing law, which allows employers to carry out random drug testing. Most of the jobs involve working with explosives or dangerous materials, transportation, cable television installation, heavy highway construction work, emergency medical services, security, or firefighting. The list is

only a guide and the DOL requires employers who want a safety-sensitive designation for their employees to justify the rationale for each job designation separately.

### ***Reasonable Suspicion***

A 1991 law required the DOL to define “reasonable suspicion” for the purposes of the state drug testing law; however, the department has not done so. In the absence of action by the department, the meaning has been largely determined by the courts. In the leading cases addressing this issue, federal courts have ruled the General Assembly intended to adopt the Fourth Amendment standard of individualized suspicion in order to protect the privacy interests of employees (*Doyon v. Home Depot U.S.A., Inc.*, 850 F.Supp. 125, 128 (D. Conn. 1994)). In practice, this standard has been applied to Connecticut’s drug testing law by asking whether all of the behaviors and circumstances observed by the employer, taken together, and viewed in the context of the employer’s own experiences and knowledge of the employee, were sufficient to create a reasonable suspicion the employee was under the influence of intoxicating substances (*Imme v. Federal Express Corp.*, 193 F.Supp.2d 519, 525 (D. Conn. 2002)).

## **TRANSPORTATION WORKERS AND COMMERCIAL VEHICLE OPERATORS**

State law requires mandatory drug testing for (1) drivers of school buses, including those owned by a state or municipality; (2) drivers of any vehicle that (a) has a gross weight rating of 26,001 pounds or more or (b) is designed to carry more than 15 passengers; or (3) drivers who transport hazardous materials in quantities that require placards under federal law. It also permits employers, including the state and municipalities, to test drivers of any motor vehicle with a gross weight rating between 10,001 and 26,000 pounds, mechanics who repair and service covered vehicles, and forklift operators (CGS § [14-261b](#)).

The state requirements apply to operators of commercial vehicles engaged in intrastate commerce. They mirror federal requirements that apply to drivers of vehicles engaged in interstate commerce. The state law requires that federal testing procedures and requirements be followed, rather than the procedures provided in state law. Federal law and regulations cover the following employers: federal, state, local governments, and any other person that owns or leases a commercial vehicle or assigns employees to operate a commercial vehicle. Federal regulations require the following:

1. pre-employment, post-job-offer testing;
2. for employees who transfer to a safety-sensitive (driver) position, testing before the person actually performs those functions for the first time;
3. post-accident testing for drivers whose performance could have contributed to the accident and for all drivers who have been involved in fatal accidents;
4. when a supervisor has a reasonable suspicion that the employee's behavior indicates drug or alcohol use;
5. random tests just before, during, and just after performing safety-sensitive duties; and
6. testing for employees returning to duty after violating prohibited drug or alcohol standards.

Employees are tested for alcohol and controlled substances.

## **OTHER FEDERAL REQUIREMENTS**

In addition to commercial vehicle operator testing requirements, various federal regulations also provide for periodic and random drug tests of workers whose jobs have safety and security implications in the aviation, railroad, maritime, mass transit, and pipeline industries. In addition, employees of the military, intelligence agencies, and defense contractors with access to classified information are subject to testing. Some employees of the U.S. Customs Service and U.S. Department of Justice are subject to testing when they are in "sensitive positions."

## **COLLECTIVE BARGAINING AGREEMENTS**

State law allows collective bargaining agreements to permit employee drug testing as long as the testing program adheres to the requirements set in state law. State law prohibits collective bargaining agreements from superseding the restrictions on drug testing employees or infringing on an employee's privacy rights.

The National Labor Relations Board (NLRB) has ruled that employers in unionized workplaces have an obligation to bargain with union representatives before establishing drug testing programs for current employees (*Johnson-Bateman Co.*, 295 NLRB No. 28, June 15, 1989). The board governs private sector collective bargaining under National Labor Relations Act (NLRA). It ruled that drug testing is a mandatory subject for collective bargaining under the NLRA because it affects the terms and conditions of employment. The ruling concerned a company that unilaterally implemented a requirement that employees involved in workplace accidents submit to drug tests. The board found the policy to be an unfair labor

practice. Drug testing is not one of those matters that “lie at the core of entrepreneurial control” and are therefore reserved to the employer's discretion.

The board has also ruled that employers may implement drug tests for job applicants without bargaining because applicants are not within the statutory definition of “employees” represented by a union for collective bargaining purposes (*Minneapolis Star-Tribune*, 295 NLRB No. 63, June 15, 1989). “There is no economic relationship between the employer and an applicant, and the possibility that such a relationship might arise is speculative,” the NLRB decided.

The State Board of Labor Relations considers drug testing a mandatory subject for collective bargaining for public employees (*New Haven Police*, Dec. Nos. 2554 and 2554A, April 9, 1987 and May 28, 1987). State law governs collective bargaining for municipal and state workers.

Federal and state laws and regulations requiring testing for transportation workers remove the employer decision to implement a drug testing policy and many of the issues surrounding the operation of such testing programs from the scope of mandatory bargaining. But even in the transportation sector, in unionized situations, all aspects of the program not fully covered in the law or regulation are subject to bargaining, including such things as the choice of the certified laboratory that will perform the drug testing, rehabilitation programs for employees who test positive, and disciplinary policies arising out of the testing program.

## **TESTING PRACTICE**

### ***Private-Sector Employees***

Pre-employment drug testing is the most common type of private-sector drug testing. In Connecticut, private employers must follow the drug testing requirements described earlier in this report.

In doing pre-employment drug testing, employers must be careful not to contravene the Americans With Disabilities Act (ADA), which recognizes drug addiction as a disability. However, the law does not protect active illegal drug users. Further, the ADA generally prohibits medical examinations for job applicants until after they are offered a job.

Drug testing programs for current employees are less prevalent. A national survey conducted in 2011 by the Society for Human Resource Management found about 36% of employers test current employees for illegal drug use. Respondents that test current employees sometimes employed multiple testing triggers: (1) 51% of

respondents conducted tests after employees were involved in workplace accidents, (2) 47% also said they conducted random testing, and (3) 35% said they

conducted “reasonable suspicion” testing, which is a test based on the employers’ suspicion the employee is under the influence while at work (Percentages total more than 100% because respondents chose more than one option).

For employers with fewer than 2,500 employees, the most common reason given for not conducting drug testing on current employees is that the organization “does not believe in drug testing.” For employers with more than 2,500 employees, the most common reason for not drug testing is that the organization is not required to drug test employees by state law.

### ***State Employees***

According to state executive branch’s [Drug-Free Workplace Policy](#), except for state employees whose jobs require a CDL or who are otherwise subject to federal requirements, state executive branch employees are subject to drug tests only when there is reasonable suspicion that they are using drugs and that it is affecting their work. Prospective executive branch employees are subject to drug tests as part of a pre-employment physical if agencies have identified their jobs as having a high risk of injury.

### ***Municipal Employees***

Generally, municipalities are allowed or required to conduct random drug tests for certain employees. Federal and state laws require municipalities to randomly drug test employees in positions with significant public safety implications, such as those required to have a CDL. State regulations require applicants for appointment as a police officer to pass a drug test as a condition of appointment (*Regs. of Ct. State Agencies*, § [7-294e-16\(k\)](#)).

Municipalities may also conduct reasonable suspicion tests when the municipal employer has a reasonable suspicion that the employee is under the influence of drugs or alcohol and that it has or could adversely affect the employee’s job performance.

## **STUDENTS IN PUBLIC SCHOOLS**

### ***The Law***

School officials have wide discretion in regulating their students, but schools may only regulate students as may be reasonably necessary to enable teachers to perform their duties. Students are subject to a greater degree of control than



adults because public schools have a custodial and tutorial authority over and responsibility to the students. This includes a responsibility for the discipline, health, and safety of the students.

There are no state or federal statutes that cover drug testing of students in school. Student testing is subject to the limitations of the Fourth Amendment prohibiting the state from conducting unreasonable searches and seizures (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). But students can be required to take random drug tests in certain situations.

Most recently, the U.S. Supreme Court ruled that public schools may subject students to random drug testing as a condition of participation in school sports and other extracurricular activities (*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 522 (2002)). Such tests are considered a "reasonable means" of preventing and deterring student drug use in a manner that does not violate the Fourth Amendment. A school does not need a "reasonable suspicion" or evidence of a drug abuse problem in order to conduct a drug testing program for extracurricular participation.

In a previous cases, the Court had ruled that a search that is unsupported by probable cause and conducted without a warrant can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" (*Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995)).

In *Vernonia*, the Court ruled that such "special needs" exist in the public school context. The six-judge Court majority based its ruling on three basic points. First, unemancipated minors do not have all the same rights as adults. Schools are allowed to exercise a degree of supervision and control over their students that could not be exercised over free adults. Second, students, and especially student athletes, have a lesser expectation of privacy than members of the general population. (The *Board of Education of Independent School District No. 92* case discussed above extended the *Vernonia* ruling to all extracurricular activities.) Third, the school district's need to discourage drug use among children is compelling enough to justify testing students.

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