Federal Update – What Will Be the Impact of the Current Federal Mandates and Are We Prepared?

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I. Act Naturally: Breast Milk Expression in the Workplace

Interestingly, the only state and federally mandated break requirement is for nursing mothers. The Patient Protection and Affordable Care Act (sometimes referred to as "Obamacare") amended the Fair Labor Standards Act, which is the federal wage and hour law. The new statute requires that employers provide special areas and break times to nursing mothers who are nonexempt (hourly and eligible for overtime) employees to express breast milk for one year after the birth of their nursing child. 29 U.S.C. § 207(r). http://www.dol.gov/whd/regs/compliance/whdfs73.htm. Some government employees in Texas were upset that the hourly employees at a government agency received these breaks, but the salaried employees did not have the same benefit. This issue was especially an issue for teachers versus teacher's aides. https://www.texastribune.org/2015/05/07/protections-breastfeeding-moms-face-senate-opposit/. In response to this disparity, a 2015 Texas bill, House Bill 786, by Representative Armando Walle, was filed and passed. State law now gives exempt (not eligible for overtime) government employees the same right to breaks and space to express breast milk. TEX. GOV'T CODE § 619.003.

Under these laws, a government employer is required to allow employees "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." 29 U.S.C. §207(r)(1)(A). These breaks must be allowed as frequently as needed. Employers should be aware that each woman is different, and the frequency and duration of each break will vary among employees.

However, while neither state nor the federal law requires these breaks be paid, they often are. Nonexempt employees would only need to be paid for this time if the break is similar to breaks that other employees are paid for, like short coffee breaks. Exempt employees' pay cannot be docked for taking breaks during the work day to express milk.

A city or other governmental entity must also provide a private location, shielded from view and free from any intrusion from others, to express breast milk. 29 U.S.C. § 207(r)(1)(A). Under the FLSA and state law, a bathroom, even if private, does not count as a location. While a private space does not have to be established strictly for the use of the breastfeeding employee, it does, however, have to be available any time the employee needs to express milk. Also, a city cannot discriminate against a breastfeeding mother simply because she needs to express breastmilk while at work. *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013).

While under federal law, a city employer with less than 50 employees does not have to provide nursing employees with these breaks or private areas if it would cause an undue burden to the employer, there is no minimum number under the new state law. This is because the state law applies to all government employees, salaried and hourly. All nursing mothers must be accommodated in this way. TEX. GOV'T CODE § 619.004.

Another provision that is present in the state law but not expressly provided for in the federal law is that every city must now have a policy regarding milk expression at the workplace. The statute requires that the policy include: (1) that nursing is encouraged; and (2) that breast milk expression will be accommodated. TEX. GOV'T CODE § 619.003. Most policies should also include: (1) that reasonable breaks are offered; (2) that a place to express breast milk is available; (3) a requirement

that an individual tell the city when they need an accommodation; and (4) that a nursing mother will not be discriminated against. The Texas Mother Friendly Workplace (part of the Department of State Health Services) has many resources available including training and policy development at http://texasmotherfriendly.org/.

a. Getting Prepared

1. Write a policy.
2. Train employees on this issue to avoid discrimination problems and on the issue of members of the public breastfeeding in the parts of city hall. where the public is allowed to be.
3. Prepare areas for breast milk expression now or upon hearing that an employee may need to have an area.

b. Practical Policy Pointers

From Texas Mother Friendly Worksite Website:

"Work schedule and work pattern flexibility will be provided to accommodate a reasonable break time for an employee to express breastmilk for her nursing child or to breastfeed each time such employee has need to express the milk or breastfeed, for up to one year after the child's birth."

In addition, consider the following examples:

1. *Lactating mothers may use time during the standard workday for milk expression. This may include various combinations of standard paid break periods, lunch periods, and other time as necessary. Lactating mothers must be afforded flexibility in their work schedules, such that the use of accrued leave or leave without pay is not required to cover time used for milk expression. While in general, this may require two to three lactation breaks a day, scheduling will be arranged on a case-by-case basis and be based on the specific needs of the employee. Supervisors and managers are responsible for ensuring that the duties of the lactating employee are covered during her expression breaks. Support also includes providing onsite child care or assistance with finding child care nearby. If the child-care facility is close, it will be easier for baby to be brought to the mother or for the mother to go to the baby on her breaks.*

As an aside, nursing mothers have the right to breastfeed anywhere they and their child are legally allowed to be. TEX. HEALTH & SAFETY CODE § 165.002. Thus, if an individual is in the public portions of city property—such as a park, a municipal court, or city hall, she has the right to breastfeed there under state law.

II. Paperback Writer: EEOC Electronic Filing

The Equal Employment Opportunity Commission is the federal agency that handles federal employment discrimination claims. Before an employee sues a city or other employer for age, race,

gender, or other discrimination, or for retaliation, they must go to the EEOC. The EEOC describes itself on its website:

> The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Our role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding. If we find that discrimination has occurred, we will try to settle the charge. If we aren't successful, we have the authority to file a lawsuit to protect the rights of individuals and the interests of the public. We do not, however, file lawsuits in all cases where we find discrimination.

Now, the EEOC has started using an electronic filing system. While this may make some filing easier, it also means that each city needs to be prepared to receive notice of charges electronically. The program is called the Digital Charge System. https://www.eeoc.gov/employers/act-digital-qanda.cfm. The EEOC has created a user guide for respondents (employers). https://www.eeoc.gov/employers/respondent_portal_users_guide.cfm.

The most important step to be prepared for the Digital Charge System is to ensure that the EEOC has the correct email address at which to reach the city. Each city needs to get on the EEOC website and make sure the EEOC has the correct email address for the city. Here is what the EEOC has said in the FAQs on its website:

> *At this time, the primary contact for a Respondent should contact their local EEOC office to provide an email address for future charges. If the EEOC has an email address for a designated contact to receive charges for the respondent employer, an electronic notice of charge will be sent to that email address on file with the EEOC. If the EEOC does not have an email address for the respondent employer, a paper notice will be mailed to the address of record for the respondent employer. The notice of the charge instructs the respondent to log into the secure portal with the specific charge number and a system generated password. These items are required to access the system.*

https://www.eeoc.gov/employers/act-digital-qanda.cfm. If the EEOC does not have an email address for the city, it will send a paper notice with instructions on how to login to the Digital Charge System. If a city or other employer does not have the technology to use the system, it can ask the EEOC for a waiver. However, if the EEOC does try to send a charge to a city, and the city does not respond or log in within 10 days, the EEOC will try to re-serve the city. Once the city is signed up, and receives a charge, it will be able to file its Position Statement and any other information for the charge online. The online system will also let the city know whether mediation is a possibility.

The EEOC's Respondent (employer) User Guide is a great resource if a city has any questions about the system.

a. Getting Prepared

1. Determine who will be the contact person for the EEOC electronic charges. Human Resource Directors, city attorney's office, city management staff, and city secretary staff may be good choices.
2. Adopt a policy for who will receive the charge and how each charge will be handled under the new system.
3. Sign up through the EEOC Digital Charge System so that the EEOC will have the correct electronic address for the city.
4. Review the EEOC's respondent user manual.
5. Train HR and administrative staff on using the Digital Charge System so that they can use it when the time comes.

b. Practical Policy Pointers

Change your current discrimination charge policy or write a discrimination charge policy that includes the new Digital Charge System. Include who will be the EEOC charges and whether they need to forward certain charges to certain department heads. Also, ensure that the policy includes training for the staff who will be using the Digital Charge System.

III. Strawberry Fields: Drug Testing

When I talk to city officials who are in Human Resources or are managing employees, one of the biggest shocks I give them is explaining how drug testing works with government employers. I have found that most cities either: (1) desire to implement random drug testing for all their employees; or (2) already have such policy in place. However, unless an exception applies (such as special safety or security concerns, reasonable suspicion, or Department of Transportation regulations), a city may not drug test its employees.

A city may only drug test its employees without individualized suspicion, also referred to as "random drug testing," if there is a "special need" that outweighs the individual's privacy interest. *Skinner v. Ry. Labor Execs. Ass'n*., 489 U.S. 602 (1989); *Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989). This standard means that most city employees may not be tested for drugs without individualized suspicion. While a private employer may often have the ability to randomly drug test its employees, governmental entities—such as cities—are Constitutionally restricted under the search and seizure provisions of the Fourth Amendment. The primary reason a city might be able to "randomly" drug test an employee is when the employee performs safety-sensitive or security-sensitive duties. Not all police officers or fire fighters fit into this category, but backhoe drivers might.

A city may randomly drug test its employees that are in safety or security sensitive positions. Examples of job duties that the courts have found to be sufficiently safety or security sensitive to warrant suspicionless drug testing include: driving passengers as United States Department of Transportation licensed drivers; operation of trucks that weigh more than 26,000 pounds; tending to or driving school children as school bus attendants and drivers; teaching children; armed law enforcement officials whose duties include interdiction of drugs; nuclear power plant duties; and

working on gas pipelines, among others. *See attached chart for specific cases.* Examples of employees whose job duties have not been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases and library workers. *See attached chart for specific cases.*

While determining who may be tested for drugs is always going to be a fact-based inquiry based on the duties of each employee, some duties lean towards allowing drug testing without individualized suspicion based on prior case law, including: carrying of passengers; driving with commercial drivers licenses or United States Department of Transportation licenses; positions that are heavily regulated by state and federal law; and operating heavy machinery. Some duties and situations that, by themselves, may not warrant suspicionless drug testing include: office duties; handling money; driving a city vehicle or police car, prior drug use; or working with the public. *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (office); *Nat'l Treasury Empls. Union v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988) (driving a car). Before performing a suspicionless drug test on an employee, a city should ensure that there is a safety or security issue involved in the person's job duties that would be affected by drug use. Since job duties and their safety or security sensitive nature is a fact issue, a city should always consult its city attorney or local counsel before implementing a random drug testing policy or testing any employee for drug use.

While a city may not usually randomly drug test its employees, some employees may be tested for drugs. Besides employees who perform safety or security sensitive functions as described above, individuals who may be tested for drugs include: (1) an applicant for employment, after the job offer is made but before they take the position, if some safety or security concern is present; (2) an employee that drives commercial vehicles and who is covered by the U.S. Department of Transportation Regulations; or (3) an employee that the city has reasonable suspicion to believe is using drugs. 42 U.S.C.A. § 12114; *Lanier v. City of Woodburn*, 518 F. 3d 1147 (2008); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (pre-employment; post-offer testing); *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (commercial driver's license); *Nat'l Treasury Emps. Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990).

Reasonable suspicion is a decision that the supervisor needs to make based on objective factors such as the appearance or actions of the employee. For example, an employer may arguably test for drugs after an accident. *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 677. A personnel policy that requires drug testing of any employee involved in a city related vehicle accident should apply to all employees equally. The employee's actions and appearance that cause the supervisor to have individualized suspicion that the employee is on drugs should be documented.

Drug testing information is confidential and should be treated very carefully. Employers must comply with the Americans with Disabilities Act when dealing with the results of such tests. 42 U.S.C. § 12112. Employers are required to keep drug test results in a separate file from an employee's personnel file and that file must remain confidential. *Id.* § 12112(d)(3)(B).

a. Getting Prepared

Make sure your current policies and practices do not include suspicionless drug testing of employees, or applicants who are not in security or safety sensitive positions. Review job

descriptions to see whose established duties would fit within the security and safety sensitive positions Remember, simply stating that a position is security or safety sensitive is not enough. Make sure you have policies in place for the storage of this information.

b. Practical Policy Pointers

If you are going to drug test employees, your policy should include:

1. Drug Free Workplace Policy that includes provisions for Commercial Driver's License Holders.
2. Under what circumstances post-accident testing will take place and ensure there is a causal element.
3. Which positions, or which types of positions, could be subjected to suspicionless drug testing.
4. What the procedure is for keeping the drug results confidential.
5. Information related to any Employee Assistance Program or other help that will be made available for anyone with an issue.
6. Direction to staff to inform HR if there are any medications that they are taking that can affect their ability to drive if their job involves driving. Make sure that it is just a matter of whether they can perform their job or not, not a detailed inquiry into their medical history.
7. A way to appeal an adverse drug test result, second testing or something similar.

Also, a city should ensure that any drug testing or drug testing policy is applied equally to each similarly situated employee, to forestall complaints of discrimination. It should also give the drug testing policy to each of its employees and have its employees acknowledge receipt of the policy.

A city should also ensure that its policy follows other federal and state mandates including the ADA regulations, as well as other state and federal law that deal with medical information. The written drug policy should be strictly and consistently followed. If a city is a federal contractor or a grantee of federal funds, the city must comply with the federal Drug-free Workplace Act of 1988. This act requires that a city adopt a "drug-free awareness" program and drug policy. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and mass transit industries. Any city employee with a Commercial Driver's License would fall under this Act and would be required to be tested for drugs pre-employment, post-accident, reasonable suspicion, and other testing. Any written city policy should reflect these requirements if a city has CDL employees.

IV. Can't Buy Me Love: Overtime Exemptions

In the fall of last year, the Department of Labor announced it was looking at a rule to almost double the amount an employee whose duties made him or her exempt from overtime would have to make before the overtime exemption could be applied.
http://www.tml.org/legis_updates/us-department-of-labor-proposes-increased-salary-rule-for-exempt-employees.

Currently, all employers must pay overtime to all "nonexempt" employees if they work more than 40 hours in a seven-day work period. However, some employees are "exempt" and do not have to be paid overtime if they work over 40 hours a week. The exemptions are based on a salary test and the definitions of executive, professional, and administrative employees. An "exempt" employee is not required to be paid overtime, but is paid his salary regardless of the number of hours the employee works.

Most employees are "nonexempt" and must be paid overtime if they work more than 40 hours in a seven-day work week. The current "standard" salary test provides that any employee who earns less than $455 a week ($23,660 a year) is automatically entitled to overtime pay, regardless of the employee's position. On the other hand, an employee who earns more than $100,000 a year is exempt from overtime compensation, regardless of job classification, under the "highly compensated employee" test.

The three primary types of employee duties that can lead to exemptions for overtime pay for individuals currently making between $23,660 and $100,000 are executive, professional, and administrative. 29 U.S.C. § 213(a)(1). For an employee to be considered exempt under the executive employee test, the employee must: (a) have as a primary duty the management of the enterprise or of a recognized department or subdivision; (b) customarily and regularly direct the work of two or more employees; and (c) have authority to hire or fire other employees (or the employee's recommendations as to hiring, firing, promotion, or other change of status of other employees are given particular weight). 29 U.S.C. § 213(a)(1).

To qualify under the professional employee exemption, an employee must have as a primary duty the performance of office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. 29 U.S.C. § 213; 29 C.F.R. § 541.300.

Finally, an employee is exempt under the administrative employee test if the employee: (a) is responsible for the performance of office work directly related to the management or general business operations of the employer or the employer's customers; and (b) exercises discretion and independent judgment with respect to matters of significance within the organization. 29 U.S.C. § 213; 29 C.F.R. § 541.200.

Whether an employee is exempt is a fact question based on job duties, but also on the objective fact on how much that employee makes in his or her annual salary. The new rules, that could be adopted as soon as July of this year, would raise the minimum salary of exempt employees from $23,660 to $47,000. That is more than double. If these rules are adopted, a city who has employees performing exempt duties, and who are exempt from overtime, and are making between $23,660 and $47,000, has two choices. First, the city could raise the salary of these exempt employees, and these employees would retain their overtime exemption. Or the city could just keep the employees at the same rate of pay, but allow them to earn overtime. Also, the rule contemplates that salary minimums would go up regularly, so keep this in mind for future raise and budgetary planning.

a. Getting Prepared (for when the rules are likely adopted)

1. Go through the job descriptions and current pay scale and see who is being treated as an exempt employee, who should be treated as an exempt employee, and how much each exempt or would-be exempt employee is making.
2. Decide how each employee will be treated if they are exempt and making between $23,660 and $47,000.
3. Start budgeting for the increased wages or overtime. It is unclear when the rule would be effective even if adopted in July. Some budgeting may need to be done now, especially if your budget season is before October.
4. Implement the city's plan once the rule is adopted.

Driving Vehicles and Vehicle Maintenance

Position	Case	Holding
Interstate Truck Drivers	*Int'l Brotherhood of Teamsters v. Dept. of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991).	"The FHWA has a compelling interest in preventing drivers from using illegal drugs while behind the wheel. Both this court and the Supreme Court have acknowledged the vital governmental interest in ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment."
Subway train drivers and other workers	*Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 821-23 (S.D.N.Y. 1990)	The ability of the performance of the worker's job to influence the safety of passengers or others determines whether they are in a safety sensitive position. Also, how much supervision an individual has and how many checks and balances on their performance determines whether their particular job at the subway is safety-sensitive. Finally, employees who carry guns likely are safety-sensitive positions.
Carry passengers	*AFGE v. Skinner*, 885 F. 2d 884, 892 (D.C.Cir. 1989), cert. denied, 495 U.S. 923 (1990); *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir.1987); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (yes to testing); *National Treasury Employees Union v. Watkins*, 722 F. Supp. 766 (D.D.C. 1989) (no to testing)	*AFGE*: "[S]trong safety interests support the testing of most Department [of Transportation] motor vehicle operators, who are responsible for, *inter alia,* the transportation of visiting foreign dignitaries and key Department officials and the operation of passenger-laden shuttle buses. Shuttle buses transport as many as 1,200 passengers each day. Thus, obvious safety interests support the testing of the majority of the Department's motor vehicle operators." *Jones:* "While the safety concern may be somewhat greater for a school bus driver, it is still quite significant in the case of an employee who is responsible for supervising, attending and carrying handicapped children. For example, the danger to a young, handicapped child, should she be dropped by an attendant or ignored while crossing the street, is obvious."
CDLs	*Keaveney v. Town of Brookline*, 937 F. Supp.	"Congress has expressly found that random testing is the most effective deterrent to limiting the number of drug and alcohol related accidents on the nation's highways. Although I find that the intrusion imposed upon the plaintiffs in this case is substantial, still it is true that the government

	975, 987 (D. Mass. 1996)	has a legitimate, compelling interest in seeking "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person[.]" *Von Raab,* 489 U.S. at 668, 109 S.Ct. at 1392. I conclude that Brookline's Testing Policy does not violate the Fourth Amendment and plaintiffs' claim under 42 U.S.C. § 1983 fails."
Backhoe driver, dump truck driver	*Krieg v. Seybold*, 481 F.3d 512, 518 (7th Cir. 2007).	"After reviewing the record, we hold that Krieg performed a safety sensitive job. Krieg testified that he regularly operated a one-ton dump truck, a dump truck with a plow, a front end loader, and a backhoe. These large vehicles and equipment present a substantial risk of injury to others if operated by an employee under the influence of drugs or alcohol. Moreover, they are significantly larger and more difficult to operate than the vans or passenger cars operated by the plaintiffs in either *Watkins* or *Lyng.*"
Forklift Driving Duties	*Shepherd v. City of E. Peoria,* 2015 WL 2455084, at *7 (C.D. Ill. May 22, 2015).	"That Shepherd only "occasionally" engaged in this activity is of no significance because it cannot be seriously disputed that even one attempt at operating a forklift while impaired by drugs or alcohol could result in grave danger to Shepherd himself and his coworkers."
Crane and tractor driver on public roads	*Plane v. United States*, 796 F. Supp. 1070, 1078 (W.D. Mich. 1992)	"As held by the Supreme Court in *Skinner* and *Von Raab,* government mandated urinalysis drug testing is not an unreasonable search and does not violate the fourth amendment when the government's compelling interest outweighs the intrusion on the employees' privacy. The facts of this case conclusively show that random drug testing of heavy equipment operators or environmental protection specialists who directly handle or inspect hazardous materials promotes a compelling government interest in protecting the safety of its employees and the public. Further, this Court holds that the safety interest promoted by the random drug testing program outweighs the intrusion on the privacy of the employees in these job classifications."

Riding lawn mowers on highway easements	*Middlebrooks v. Wayne County*, 446 Mich. 151, 165-66 (Mich. 1994)	"We turn to a consideration of whether dismissal was properly entered of Middlebrooks' claims under the Michigan Constitution. While "[w]e have, on occasion, construed the Michigan Constitution in a manner which results in greater rights than those given by the federal constitution, and where there is compelling reason, we will undoubtedly do so again," we are not convinced, in light of Middlebrooks' diminished expectation of privacy in not being subjected to urinalysis drug screening by the government as a result of his application for a position with a governmental agency, that urinalysis testing of Middlebrooks constituted "a major contraction of citizen protections under our constitution...." On the facts of the present case, we decline the invitation to construe art. 1, § 11, and other provisions of the Michigan Constitution relating to personal privacy and due process of law, to provide broader protection against urinalysis testing of operators of vehicles than the Fourth Amendment."
Aircraft Mechanic	*AFGE v. Skinner*, 885 F. 2d 884 (D.C.Cir. 1989), cert. denied, 495 U.S. 923 (1990) (aircraft mechanic) *Am. Fed. Of Gov't Empls., AFL-CIO v. Dole*, 670 F.Supp. 445, 448-49 (D.D.C. 1987).	"Thus, on balance, the preponderance of the proof supports the reasonableness of the random plan. DOT's duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed. The plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion. The plan must be sustained against this generalized facial attack."
School Bus Mechanic	*English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775, 783 (N.D. Ala. 1996) (school bus mechanic)	"This case presents facts nearly identical to those in *Skinner.* Here, the unrebutted Affidavit of defendant Hayes establishes the obvious-that an employee who inspects, repairs, and drives large buses (sometimes filled with containers of oil) cannot be impaired by drug use. Sloppy inspection, repair, or driving could all create the potential for great human loss, particularly when one considers buses loaded with children. And, the random nature of the Board's testing serves the same deterrent effect as the tests in *Skinner.* And, as in *Skinner,* requiring the Board to base drug testing decisions on individualized suspicion would severely undercut the utility of the tests; the

		Supreme Court accepted the argument in *Skinner* that railroad employees could cause great injury before signs of drug use were evident, and the same is true here. So, to conclude, the Board's intrusion on plaintiff's privacy interests was minimal, and was justified by compelling governmental needs that would be frustrated if individualized suspicion were required. *Skinner* controls this case, and the Court concludes that defendants' drug testing policies were not "unreasonable" under the Fourth Amendment."
Air Traffic Controllers	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	"In the present case, the FAA administrative record included evidence that a number of pilots and other airline crew members had received treatment for cocaine overdoses or addiction; that tests by companies in the industry had turned up instances of drug use by pilots and mechanics; and that drugs were present in the bodies of pilots in two airplane crashes.[FN6] Moreover, the harm that can be caused by an airplane crash is surely no less than the harm that might be caused by drug impairment in the course of Customs Service employment. When viewed in this light, the need for the FAA's testing program equals, if not exceeds, that for the Customs Service program approved in *Von Raab.*" "FN6. Although the FAA has made a showing of drug use by airline employees, we note that nothing in *Von Raab* requires such a showing. *See Harmon v. Thornburgh,* 878 F.2d 484, 487 (D.C.Cir.1989) ("Nor is it necessary [under *Von Raab*] that a documented drug problem exist within the particular workplace at issue.")."
Coast guard ship cooks and painters	*Transp. Inst. v. U.S. Coast Guard*, 727 F.Supp. 648, 658-59 (D.D.C. 1989) (no to testing)	"The Court has not been shown that the governmental interest randomly testing all crewmembers for drugs in the interest of safety outweighs the crewmembers' privacy interests. The regulations providing for random testing, as currently drawn, cannot be sustained under the Fourth Amendment. As such, the Court will enjoin the implementation of the regulations providing for the random testing of all crewmembers.

		It is likely, however, that some crewmen within the currently drawn regulations perform duties so directly tied to safety, that they could constitutionally be required to undergo random testing. *See Harmon,* 878 F.2d at 493. Given the minimal information the Court now has regarding the job and emergency duties of the various crewmembers, the Court will decline to draw lines which the Coast Guard itself has not drawn. The Court will leave the reformulation of the regulations providing for random testing to the Coast Guard."
Flight Crews	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	See above
Custodian	*Bolden v. S.E. Pa. Transp. Auth.*, 953 F.2d 807, 823 (3rd Cir. 1991), cert. denied, 504 U.S. 943 (1992) (no to testing); *Aubrey v. Sch. Bd. Of Lafayette Parish*, 148 F.3d 559, 564-65 (5th Cir. 1998) (yes to testing school custodian)	Bolden: "It is clear that compulsory, suspicionless drug testing of a person holding Bolden's job falls outside the precedents discussed above. In all of those cases, the employees subjected to suspicionless testing were found to have diminished privacy expectations due to pervasive governmental regulation of the jobs they performed. Here, SEPTA has not shown that maintenance custodians are pervasively regulated or that they have diminished privacy expectations for any other reason." Aubrey: "The custodial position was considered safety sensitive because of the handling of potentially dangerous machinery and hazardous substances in an environment including a large number of children ranging in age from three to eleven. Aubrey and other custodial employees "reasonably should expect effective inquiry into their fitness and probity" to operate and use such material in a school setting. The position has a possible impact on the physical safety of the students in their educational environment and the presence of someone using illegal drugs increases the likelihood that children will have an open avenue to obtain the drugs." "The school system's role as a guardian does not end with protecting children from their own actions, but must deter potentially dangerous actions of adults, including school employees, who may have interaction with and influence upon them. We therefore conclude and hold that the Board's need to conduct the suspicionless searches pursuant to the drug testing policy outweighs the privacy

		interests of the employees in an elementary school who interact regularly with students, use hazardous substances, operate potentially dangerous equipment, or otherwise pose any threat or danger to the students."
Aircraft dispatchers	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	See above
Flight attendants	*Bluestein v. Skinner*, 908 F.2d 451, 457-58, n.10 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	"Petitioners also argue that the FAA's decision to include flight attendants within the testing requirements is inconsistent with prior FAA decisions denying petitions of flight attendants to establish safety rules limiting their on-duty time. The duty time decisions, however, do not stand for the proposition that impairment of flight attendants' performance is never a public safety consideration. Rather, the FAA concluded that, on the evidence before it, there was no correlation between flight attendant duty time and risk to passengers. We see no conflict between the duty time decisions and the inclusion of flight attendants in the drug testing program.[FN10] Accordingly, we hold that the FAA acted within its authority in requiring random drug testing of flight attendants." **"FN10.** Although petitioners do not directly contend in this proceeding that flight attendant positions are not safety-sensitive, it is nonetheless worth noting that the administrative record adequately supports the FAA determination that such positions are, in fact, safety-sensitive. Flight attendants must perform important safety functions in the event of emergencies, and are also routinely responsible for ensuring that luggage is safely stored and the airplane doors properly closed and locked prior to departure."
Railway employees	*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620-21 (1989).	"This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty."

City Bus Drivers	*McGrath v. City of Albuquerque*, 2015 WL 4997153, at *58 (D.N.M. July 31, 2015)	Court held that suspicionless drug testing of bus drivers was not a violation of the Fourth Amendment because their duties are similar in nature to railway employees.

Public Safety

Position	Case	
Police	*Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656, 672 (1989) (firearms and drug interdiction); *Carroll v. City of Westminster*, 233 F.3d 208, 213 (4th Cir. 2000); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990); *Brown v. City of Detroit*, 715 F. Supp 832 (E.D. Mich. 1989) (allowing testing for officers who use force and make arrests)	*Von Raab:* "We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. Cf. *In re Caruso v. Ward,* 72 N.Y.2d 432, 441, 534 N.Y.S.2d 142, 146-148, 530 N.E.2d 850, 854-855 (1988). While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders." *Carroll:* "Moreover, courts have long recognized that individuals in certain safety-sensitive professions, such as law enforcement, have a reduced expectation of privacy."

Firefighters	*Hatley v. Dept. of the Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998); *Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) (yes); *Brown v. Winkle*, 715 F. Supp. 195 (N.D. Ohio 1989) (yes); *Wilcher v. City of Wilmington*, 891 F. Supp. 993 (D. Del. 1995) (yes); *Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) (no)	*Hatley:* "Petitioner was a firefighter. The safety of others was in his hands, and an impairment due to drug use could well have led to otherwise avoidable injury or death. It is generally established that employees responsible for the safety of others may be subjected to drug testing, even in the absence of suspicion of wrongdoing. Employees who have been held to be subject to random drug testing without violation of the Fourth Amendment include pipeline operators, airline industry personnel, correctional officers, various transportation workers, Army civilian guards, civilian workers in a military weapons plant, Justice Department employees with clearance for top-secret information, police officers carrying firearms or engaged in drug interdiction efforts, and nuclear power plant engineers." *Penny*: "Next, it is apparent that the district court's principal conclusion that drug-testing of these employees must be based upon particularized suspicion of drug or alcohol use would seriously impede the employer's ability to obtain information needed to advance the established compelling interest. Without reviewing all of the rationale or the various considerations marshaled by the majority in *Von Raab* and *Skinner,* it is sufficient to hold here that the district court's conclusion that this employer must require a reasonable and particularized suspicion as a precondition to any such testing must perforce fail." *Beattie*: "On the facts of this case, the Court finds that the City's interest is not of such a compelling nature that it is impractical to require some level of individualized suspicion. The annual physicals have protected the public's welfare since 1974. The City does not claim that the physical exams and daily observation of the firefighters' job performances are now insufficient to judge their job fitness. Without some form of individualized suspicion or some compelling reason beyond a hypothetical future problem, the invasion of the firefighters privacy interests is unjustified in this case."

Police cadets	*O'Connor v. Police Comm'r of Boston*, 408 Mass. 324, 330; 557 N.E.2d 1146 (Mass. 1990)	"As we have said, the defendants had a compelling interest in determining whether cadets were using drugs and in deterring such use. Those interests outweigh the plaintiff's privacy interest not only under art. 14, but under G.L. c. 214, § 1B, as well."
Police who do not carry firearms and are not involved in drug crimes	*Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.), cert. denied, 493 U.S. 963 (1989) (questioning right to randomly test)	"The record in our case makes clear that the drug testing before us applies to police officers who carry firearms and to those who participate in drug interdiction. To this extent, since we can find no relevant distinction between a customs officer and a police officer, we hold the Police Department's drug testing rule to be constitutional. The rule also seems to apply to other members of the Department who may not carry firearms or enforce the drug laws."
EMTs	*Piroglu v. Coleman*, 25 F.3d 1098, 1103 (D.C. Cir. 1994)	"On this record, Piroglu's privacy interest in being free from a warrantless drug test is insubstantial. Because the District's interest in randomly testing its trainees outweighs Piroglu's privacy interest, we reject her argument that the fourth amendment required the District to obtain a warrant before testing her."
Customs Officials doing Drug Interdiction	*Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656, 672 (1989); *Nat'l Treasury Empls. Union v. Hallett*, 756 F. Supp. 947 (E.D. La. 1991); *Nat'l Treasury Empls. Union v. Hallett*, 776 F. Supp. 680 (E.D.N.Y. 1991); *Nat'l Treasury Empls. Union v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994)	"We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness."

Chain of Custody employees	*Nat'l Treasury Empls. Union v. U.S. Customs Serv.*, 27 F.3d 623, 630 (D.C. Cir. 1994) (not subject to random drug testing)	"Over the past decade and more, the United States Government has waged an extraordinary and costly campaign to contain the drug trade. A single shipment that arrives in the United States undetected may have a value in the millions of dollars and can bring misery and death to large numbers of our citizens. The Customs Service has made a plausible case that a drug trafficker in possession of the information contained in the ACS and TECS II databases can significantly improve his chances of successfully smuggling his next shipment of drugs into the United States. That being the case, we have no difficulty in concluding that the Government's interest in protecting this information outweighs the intrusion that random drug testing imposes on employees whose expectations of privacy have been diminished by their subjection to comprehensive background checks."
Prison Guards	*AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993), *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989), *Seeling v. Koeher*, 76 N.Y. 2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832 (N.Y.), cert. denied, 498 U.S. 847 (1990)	"That decision, which came two months after the injunction issued by the district court herein, may now be followed by it in setting out the criteria for testing for reasonable suspicion. We have already held that all correctional officers are primary law enforcement employees, so that the Bureau has a special need to test them randomly. By the same reasoning, all are subject to testing for reasonable suspicion of the use of drugs, on duty or off. *See id.* at 792. *CONCLUSION* The injunction of the district court must be modified so that it enjoins only the random testing of employees outside correctional institutions who do not have access to information regarding the Witness Security program or the Witness/Victim program and so that it allows testing on suspicion of all employees subject to random testing in accordance with the criteria of *Martin.*"
Juvenile Detention Guards	*Washington v. Unified Gov't of Wyandotte Cty., Kan*, 2015 WL 4496276, at *1 (D. Kan. July 23, 2015)	Plaintiff was training supervisor for officers who ran the juvenile detention center. The Court held it was constitutional to perform suspicionless drug testing on the employee. "Plaintiff's duties, even if administrative, may involve direct contact with or interdiction of illegal drugs or improvised weapons within the facility. Plaintiff performs a supervisory, and sometimes direct, role in the safety and educational development of residents. His success in the role of supervisor, trainer, and advisor depends uniquely on his judgment and ability to reason clearly."

Federal prosecutors with access to grand jury proceedings	*Harmon v. Thornburgh*, 878 F.2d 484, 496. Cir. 1989), cert. denied, sub nom, *Bell v. Thornburgh*, 493 U.S. 1056 (1990)	"We conclude that all DOJ employees holding top secret national security clearances may constitutionally be required to undergo random urinalysis. The district court should therefore modify the current injunction so as to permit the testing of individuals within this category. The injunction should, however, be maintained insofar as it prohibits the Department from implementing its current plan to test all federal prosecutors and all employees having access to grand jury proceedings. The case is remanded to the district court for further proceedings not inconsistent with this opinion."
Executive Department with security clearance	*Hartness v. Bush*, 794 F. Supp. 15, 17 (D.C.C. 1992); *AFGE v. Sullivan*, 744 F.Supp. 294 (D.D.C. 1990); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, sub nom, *Bell v. Thornburgh*, 493 U.S. 1056 (1990)	"A further question remains with respect to Ms. Ferrantello. If she is otherwise properly included in the category of EOP employees earmarked for testing, her "secret" clearance would preclude the relief she seeks, irrespective of her access to the Old EOB."

Medical Personnel

Nurses	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	"Because the positions occupied by the five named plaintiffs, those of physician, nurse, pharmacist, medical technician and dialysis technician, require the discharge of duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous

		consequences, the court finds that defendants have a compelling interest in requiring the proposed random drug testing and that interest prevails over the expectation of privacy entertained by the incumbents of those five positions."
Pharmacists	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	See above
Physicians	*Pierce v. Smith*, 117 F.3d 866, 880Cir. 1997); *AFGE v. Derwinsky*, 777 F.Supp. 1493, 1496 (N.D. Cal. 1991)	Pierce: "We conclude that in a situation of this character-a non-law enforcement, employer-school search where there are very special needs and the intrusiveness of the search and the subject's privacy interests are minimal-there is not now, and was not in March 1990, any clearly established Fourth Amendment requirement for either an existing general search policy or individualized suspicion of the type required for a law enforcement *Terry* stop for drug possession. This is not to say that there must not be some legitimate reason for the individual being singled out. The search must be reasonable under all the circumstances, balancing the individual's privacy interests against the interests of the governmental institution."
Dentists	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	See above

Elected Officials

Elected Officials	*Chandler v. Miller*, 520 U.S. 305, 308, 318-19 (1997).	"Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches." "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. See supra, at 1300–1302. Georgia has failed to show, in justification of § 21–2–140, a special need of that kind.

		Respondents' defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Brief for Respondents 11–18. The statute, according to respondents, serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office. Id., at 17–18. Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."

Applicants

Applicants	*Lanier v. City of Woodburn*, 518 F.3d 1147, 1152 (9th Cir. 2008) (library page applicant could not be tested): *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013), *cert denied.*	*Lanier:* "We conclude that Woodburn has not articulated any special need to screen Lanier without suspicion. This is the "core issue." *Chandler*, 520 U.S. at 317–18, 117 S.Ct. 1295. Beyond it, we discern no substantial risk to public safety posed by Lanier's prospective position as a part-time library page. Consequently, we need not pause over the City's remaining points—that invasion of Lanier's privacy interests is slight given the minimally intrusive form of testing, that the testing would have occurred pre-employment, and that she was in any event subject to an extensive background check which further diminished any expectation of privacy she may reasonably have had. We express no opinion as to the weight of these considerations, if any, in a different case."

Behavior and Accidents

Prior Drug Test Came Back Positive	*Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993), aff'd without opinion, 41 F.3d 1501 (2nd Cir. 1994) (no to testing)	"This Court finds, as a matter of law, that the Transit Authority regulation permitting mandatory drug screening "when a Controlled Substance has been identified in a prior test" (Policy Instruction, at § 5.3.5) satisfies the Fourth Amendment requirement for reasonableness."
Accident with Inanimate Object-Simple Fault	*Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991).	"By requiring drivers to undergo drug testing after certain specified accidents, GCRTA's drug policy supplied "an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Skinner,* 109 S.Ct. at 1419. A collision with a fixed object is "a triggering event, the timing of which no employee can predict with certainty." *Id.* at 1420. Therefore, GCRTA's post-accident testing policy is reasonably related to the compelling governmental interest in protecting public safety."
Injury with No Showing of Individual Fault	*United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998).	"The two parish school boards have offered no legal justification for insisting upon drug testing urine without a showing of individualized suspicion of wrongdoing in a given case, certainly nothing beyond the ordinary needs of law enforcement. Special needs are just that, special, an exception to the command of the Fourth Amendment. It cannot be the case that a state's preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion. It is true that the principles we apply are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience of government, or allow their teaching to be so lightly slipped past. Surely then it is self-evident that we cannot rest upon the rhetoric of the drug wars."
Railroad Employees at Scene of Major Accident	*Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 633 (1989).	"We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns."

Behavior May Not Be Enough	*Nat'l Fed. Of Fed. Emps, AFL-CIO v. Cheney*, 742 F.Supp. 4 (D.C.D.C. 1990).	"This list appears to have nothing to do with drug abuse; rather it appears to be catalogue of symptoms of poor work habits, bad attitudes, or even bad luck. Nothing in defendants' filings explains why employees who make too many personal telephone calls may reasonably on that account be subjected to drug tests. Nor is there any appreciable link between drug use and over-sensitivity to criticism, preoccupation with personal problems, or erratic work habits. Likewise, it defies common sense to assert that an off-the-job injury is symptomatic of drug abuse. The proposition that long lunch breaks are indicia of drug abuse is nothing short of ludicrous; there are dozens of more likely reasons."
Erratic Behavior of ER Doctor—Qualified Immunity	*Pierce v. Smith,* 117 F.3d 866 (5th Cir. 1997).	"Considering that *Skinner* authorized drug tests on a discretionary, ad hoc basis if the employee had been involved in certain rule violations but without further individualized suspicion, that that principle had not (and has not) been held by the Supreme Court or this Court to be dependent on the prior existence of a rule so providing, and that objective factors distinguished Dr. Pierce from other residents in the program so that she was not singled out arbitrarily or capriciously, and considering also the minimal intrusiveness and extent of the invasion of Dr. Pierce's Fourth Amendment interests and the legitimate special needs of the medical school program where she was a student-employee, we conclude that Drs. Smith and Binder are entitled to qualified immunity as a matter of law. The question is not whether other reasonable or more reasonable courses of action were available. It is, rather, whether of medical school officials similarly situated to Drs. Smith and Binder "all but the plainly incompetent" would have realized at the time that what they did violated Dr. Pierce's Fourth Amendment rights. *Hunter* at 228, 112 S.Ct. at 537; *Blackwell* at 304. Under the circumstances, that question must be answered in the negative."