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DRUG TESTING

Drug testing all substitute teacher position applicants is constitutional

By Tom Harper
The Law and Mediation Offices of
G. Thomas Harper, LLC

In a case of first impression (meaning, the first time the court has considered the issue), the federal appeals court over Florida has ruled that a county school board may require all applicants for substitute teacher positions to submit to and pass a drug test as a condition of employment. This may sound like a no-brainer, but the Fourth Amendment to the U.S. Constitution prohibits government searches without a reason, which complicates a public-sector employer's ability to test for drugs.

Facts

In its long, 22-page opinion, the appeals court found that the Palm Beach County School Board may collect and test the urine of all prospective substitute teachers without any suspicion of wrongdoing. The court held that the school board has a *sufficiently compelling interest* in screening its prospective teachers to justify this invasion of job applicants' privacy rights. Because of that compelling interest, the action doesn't violate the Fourth Amendment's ban on unreasonable searches and seizures by the government. According to the court, "ensuring the safety of millions of schoolchildren in the mandatory supervision and care of the state, and ensuring and impressing a drug-free environment in our classrooms, are compelling concerns."

But before anyone assumes that all preemployment drug testing is now legal, the court explained that its analysis "depended on the specific facts and unique circumstances found in our public schools" and was based on the *testing policy and protocol* used by the school district, "the efficacy of the testing regime, and the duties and responsibilities of substitute public school teachers."

How Palm Beach tested

Joan Friedenberg applied online for several positions with the school district—e.g., tutor, substitute teacher, and early childhood aide. The online application required that all applicants agree to be tested for drugs. In early 2017, she received a conditional offer to become a substitute teacher. As a part of the hiring process, she was fingerprinted so that a full background check could be conducted. However, when she was told that she would have to pass a drug test before she could be hired, she refused to be tested and eventually sued the district when she wasn't hired.

The school district has a written drug- and alcohol-free workplace policy that provides for drug testing in compliance with Florida's Administrative

AGENCY ACTION

EEOC announces increases in outreach, enforcement for 2018. The Equal Employment Opportunity Commission (EEOC) noted increases in its 2018 outreach and enforcement actions as it released its annual Performance and Accountability Report in November 2018. Highlights in the report include the launch of a nationwide online inquiry and appointment system as part of the EEOC's Public Portal, which resulted in a 30 percent increase in inquiries and over 40,000 intake interviews. The report also noted that the EEOC's outreach programs reached 398,650 individuals, providing them with information about employment discrimination and their rights and responsibilities in the workplace.

DOL, DHS propose rule for employers seeking H-2B workers. The U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS) in November published a proposed rule that would modernize the recruitment requirements for employers seeking H-2B nonimmigrant workers. The intent is to make it easier for U.S. workers to find and fill those jobs. The proposed rule would require electronic advertisements to be posted on the Internet for at least 14 days. The H-2B program allows U.S. employers or agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary nonagricultural jobs. The DOL simultaneously proposed a similar rule for temporary labor certifications through the H-2A visa program for agricultural workers.

DOL releases wage and hour opinion letters. The DOL announced in November that it had issued four new opinion letters addressing compliance under the Fair Labor Standards Act (FLSA). The four letters, available at www.dol.gov/whd/opinion/guidance.htm, address (1) the application of FLSA Section 7(k) to nonprofit, privately owned volunteer fire departments, (2) the "reasonable relationship" between salary paid and actual earnings, (3) the application of Section 13(a)(3) to a pool management company, and (4) dual jobs and related duties under Section 3(m). An opinion letter is an official opinion by the DOL's Wage and Hour Division (WHD) on how a law applies in specific circumstances presented by the person or entity requesting the letter.

OSHA issues crane operator rule. The Occupational Safety and Health Administration (OSHA) published a final rule in November to clarify certification requirements for crane operators. OSHA said the new rule will reduce compliance burdens while maintaining safety. The final rule, with the exception of requirements on evaluation and documentation, became effective December 9, 2018. The evaluation and documentation requirements will take effect February 7, 2019. ✤

Code. The specific protocol it follows was a key factor in the court's decision that the testing was legal. The testing is performed in a manner that is as sensitive as possible to the privacy rights of the individual, and it follows the state's administrative code to the letter.

The test results are shown to only five individuals within the school board's Department of Risk and Benefits Management and are held in a "confidential electronic medical folder." They are *not* reported to any law enforcement official. The hiring school site is told only that the applicant did not pass a medical examination.

In the court's analysis, the time spent alone in the classroom with students and the duties and responsibilities of a substitute teacher are important. Substitute teachers are responsible for discipline and breaking up fights. As the court reasoned, "even a momentary lapse of attention . . . could be the difference between life and death, and . . . while the magnitude of the public safety risk presented by an impaired teacher is not comparable to that presented by an impaired railway operator or armed customs official, the special responsibility of substitute teachers for the care of society's most vulnerable members [is] distinct and notable."

The court also looked at the number of applicants tested and found that only a small percentage (about 40 out of 4,900 applicants) were not hired due to positive or refused drug tests. It's important to note that the court found the testing is legal *only for substitute teachers* and did not address the legality of the broader group of all non-safety sensitive positions in the district.

Narrow exception

In finding that Friedenberg's rights were not violated, the appeals court noted that the U.S. Supreme Court had developed a narrow exception to the Fourth Amendment's expectation of *individualized suspicion* when a search "serves special governmental needs." The high court found that a search made without individualized suspicion of wrongdoing can

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ASK ANDY

Adhere to the scout motto: 'Be prepared' (during interviews)

by Andy Rodman and
Thomas Raine (Law Clerk, Univ. of Miami)
Stearns Weaver Miller, P.A.

An online CNBC article that we read last week, written by Ruth Umoh, got us thinking. The article discussed the three interview questions that General Motors' CEO Mary Barra asks of every job candidate:

- How would your peers describe you in three adjectives?
- How about your supervisor?
- How about those who have reported to you?

Placing a high value on integrity, influence, and teamwork, Barra expects all three questions to elicit the same adjectives. "You don't want people to manage up differently than they manage down, and you want people to work just as well with their peers and supervisors as they do with their subordinates."

For Barra, the *way* an applicant answers these questions is just as important as the *substance* of the answers. A candidate's response to questions about horizontal and vertical relationships in the workplace can help assess important character traits, such as her ability to think spontaneously and her level of self-awareness.

So, what can we learn from Mary Barra? Most importantly, we're reminded that preparing for an interview is very important. In other words, interview with a plan and a purpose. Although nothing guarantees a successful hire, a carefully planned and executed interview gives the HR professional the best shot at hiring the best candidate.

Think of it like this – the candidate likely spends time researching your company, and maybe even researching *you*, in preparation for the interview. Why shouldn't you prepare, too, by mapping out your questions (in addition, of course, to researching the candidate) in advance of the interview? Too often, in our experience, interviewers "wing it" during an interview, come across as ill-prepared in the candidate's eyes, and perhaps fail to elicit important information. You may have only 15 to 20 minutes with the candidate. If you want to make every minute count, you'd better be prepared.

When mapping out your interview questions, keep in mind your company's goals and culture, the type of position for which you are hiring, and the traits you wish to see in the ideal candidate. That's precisely what Barra did in formulating her three interview questions.

Also, be sure to look for (and question the candidate about) obvious "holes" in her resume. Has she hopped around from job to job? Are there lengthy gaps between jobs? Is she currently employed, and if not, why not? Don't be afraid to ask questions about obvious "holes" in her background.

Remember that interview questions don't always have to be job-related. Maybe you want to learn something about the candidate *as a person*, such as her hobbies or interests. Many candidates list that type of information at the bottom of their resumes. They are listed for a reason. Don't be afraid to inquire. Simply engaging in conversation, particularly on a topic on which the applicant is interested, may help you assess, for example, her communication skills.

The most productive interviews often are conversational and chatty, as opposed to rapid-fire question and answer. A formulaic, point-by-point interview might get at bare-bones credentials, but a flowing conversation that hits key topics and core questions may help you get a better sense of the candidate's most valuable traits as a worker and a person.

Interviewing is an art that carries its own legal risks. As all HR practitioners know, certain topics are off-limits, such as questions that may elicit information about the candidate's age, sexual orientation, disability, prior workers' compensation claims, or desire to have children, just to name a few. And the off-limits questions vary by state. So, make sure you consult with your employment counsel if you have any questions about the interview process in general or about the off-limits questions.

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be reasonable "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." The special need must raise a "concern other than crime detection," and in order to satisfy the Fourth Amendment, it 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." When a special need is claimed, the court will make "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."

In this case, the court weighed the danger against which the testing regime was intended to guard—the danger posed by drug-addicted teachers in the classroom. The court held that a "special need" was evident. According to the court, "the danger posed by intoxicated teachers is significant and it is 'readily apparent' that the School Board 'has a compelling interest in ensuring' that teachers, [and even substitute teachers,] are not habitual drug users." Balanced against the need, the court found that the particular testing program and protocol used were minimally invasive of individual rights. The lower federal court in south Florida had denied an injunction to stop the testing requirement, and the appeals court affirmed that district court's decision. *Joan E. Friedenberg, et al. v. School Board of Palm Beach County,* Case No. 17-12935 (11th Cir., December 20, 2018).

Takeaway

Drug testing is a search of an individual, and searches must be reasonable. To decide if a search is reasonable, a court in Florida will consider whether the government has demonstrated a "special need" to bypass the Fourth Amendment's warrant requirement. If a special need is shown, a court will weigh it against the public and private interests involved. As the appeals court held in this case, "this calculus is highly dependent on the context of the search and the status or role of the person being searched," and the classroom presents a unique circumstance because teachers and administrators have a "legitimate need to maintain an environment in which learning can take place."

This decision doesn't open the doors for all public-sector—or even school—drug testing. Instead, the courts will make the determinations on a "case-by-case, job-by-job, search-by-search basis." Public-sector employers should study this decision carefully and conform their policies and procedures to the balancing of interests that a court will make.

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WAGE AND HOUR LAW

A 2019 refresher on paying tipped employees

The U.S. Department of Labor (DOL) continues to devote substantial resources to investigating certain low-wage industries each year. Among those regularly targeted are fast-food establishments and other restaurants, grocery stores, and construction companies. The Wage and Hour Division (WHD) conducted 5,751 investigations of food-service establishments during fiscal year 2018, resulting in more than 41,000 employees being paid almost $43 million in back wages. A large part of the back wages resulted from improper use of tip credit provisions. Although this article will address only the requirements of the Fair Labor Standards Act (FLSA), you should be aware that several states don't allow tip credits. Florida, however, does allow employers to use tip credits.

Who is a tipped employee?

The FLSA defines tipped employees as workers who customarily and regularly receive more than $30 in tips per month. The Act permits an employer to take a tip credit toward its minimum wage obligations to tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The minimum hourly wage in Florida increased from $8.25 to $8.46 on January 1, 2019. The 21-cent increase was based on the percentage increase in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the South Region for the 12-month period preceding September 1, 2018. Restaurant and hotel employers in Florida may still take a tip credit of up to $3.02 per hour against the new minimum wage. As a result, tipped employees whose employer takes a tip credit must receive direct wages of at least $5.44 per hour starting January 1.

Information requirements

The regulations, which became effective in April 2011, state that an employer must provide the following information to a tipped employee before using the tip credit:

(1) The amount of cash wages the employer will pay tipped employees (at least $5.44 per hour);

(2) The additional amount claimed by the employer as a tip credit;

(3) An explanation that the tip credit claimed by the employer cannot exceed the amount of tips actually received by tipped employees;

(4) An explanation that all tips received by tipped employees are to be retained by employees except for a

valid tip-pooling arrangement that is limited to employees who customarily and regularly receive tips; and

(5) A statement that the tip credit will not be applied to tipped employees unless they have been informed of the tip credit provisions.

The regulations state the employer may provide oral or written notice to tipped employees to inform them of the tip credit provisions. Further, the regulations state that an employer must be able to show it has provided notice. An employer that fails to provide the required information cannot use the tip credit provisions and must pay tipped employees at least $8.46 per hour (Florida minimum) and allow them to keep all tips received. To make it easier to prove that the notice has been furnished to employees, written notice should be provided.

Florida employers electing to use a tip credit must be able to show that tipped employees received at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips and the direct wage of at least $5.44 do not equal the minimum hourly wage of $8.46, the employer must make up the difference.

Whose tip is it?

The regulations state that tips are the sole property of tipped employees regardless of whether the employer takes a tip credit. The regulations prohibit any arrangement between the employer and tipped employees in which any tips become the employer's property.

The DOL's 2011 final rule amending its tip credit regulations specifically sets out the WHD's interpretation of the FLSA's limitations on an employer's use of its employees' tips when a tip credit is not taken. The rule states in pertinent part:

> Tips are the property of the employee whether or not the employer has taken a tip credit. . . . The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted: as a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Tip pooling

The 2011 regulations allow for tip pooling among employees who customarily and regularly receive tips, such as servers, bellhops, and bartenders. Conversely, a valid tip pool may not include employees who don't customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. One factor that helps determine who may be included in a tip pool is employee interaction with customers.

One positive change: The 2011 regulations did not impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of a required tip-pool contribution amount and may take a tip credit only for the actual tips each tipped employee ultimately receives.

WORKPLACE TRENDS

Turnover hits all-time high. Research from Salary.com indicates that total workplace turnover in the United States hit an all-time high in 2018, reaching 19.3%. That's nearly a full percentage point from 2017 and more than 3.5% since 2014. The report contains data from nearly 25,000 participating organizations of varying sizes in the United States. By industry, hospitality (31.8%), health care (20.4%), and manufacturing and distribution (20%) had the highest rates of total turnover. Utilities (10.3%), insurance (12.8%), and banking and finance (16.7%) had the lowest. By area of the country, the South Central region (20.4%) and the West (20.3%) had the highest rates of total turnover. The Northeast (17.3%) had the lowest rate of total turnover in the country.

Survey finds workers comfortable conducting job search at work. A survey from staffing firm Accountemps has found that 78% of workers surveyed said they would feel at least somewhat comfortable looking for a new job while they're with their present company. More than six in 10 respondents (64%) indicated they would likely conduct search activities from work. The survey found that professionals ages 18 to 34 are the most open to conducting job search activities at work (72%), compared to those ages 35 to 54 (63%) and 55 and older (46%). Also, the research showed men are more likely to conduct job search activities from the workplace (72%) than women (55%). "Looking for a new opportunity during business hours can be risky and potentially threaten current job security," cautions Michael Steinitz, executive director of Accountemps. "While it's OK to pursue new opportunities while employed, a search should never interfere with your current job." He suggests scheduling interviews outside of work hours.

Study looks at managers' ability to communicate when heat is on. A manager's ability or inability to communicate during high-stakes, high-stress situations directly affects team performance, according to a study from VitalSmarts, a leadership training company. Managers who clam up or blow up under pressure have teams with low morale that are more likely to miss deadlines, budgets, and quality standards, the researchers found. According to a survey of 1,334 people, at least one out of every three managers can't handle high-pressure situations. Among the findings: 53% of managers are more closed-minded and controlling than open and curious, 45% are more upset and emotional than calm and in control, 45% ignore or reject rather than listen or seek to understand, 43% are more angry than cool and collected, 37% avoid or sidestep rather than being direct and unambiguous, and 30% are more devious and deceitful than candid and honest. ✤

UNION ACTIVITY

Unions lose right-to-work ruling in Kentucky. The Kentucky Supreme Court in November affirmed a previous court ruling that upheld the state's right-to-work law. The 4-3 decision sparked criticism from union interests. "We agree with the justices who dissented," Bill Londrigan, president of the Kentucky State AFL-CIO, was quoted as saying in the *Louisville Courier-Journal*. "This law applies only to labor unions. It's designed to discriminate against unions to choke off the financial resources we need because we're required to provide services to all workers in the bargaining unit." The state legislature passed the right-to-work law in 2017.

Mine workers assail West Virginia black lung ruling. The United Mine Workers of America (UMWA) spoke out against a November ruling of the West Virginia Supreme Court on black lung benefits, calling it a travesty. The ruling, which "limits the ability of miners who are suffering from black lung to file workers' compensation claims[,] is a travesty," UMWA President Cecil E. Roberts said. "The new majority on the court threw out decades of settled law and clear legislative intent in an outrageous ruling that demonstrates a callous disregard for human suffering, especially at a time when black lung is on the rise among miners of all ages."

NEA speaks out against Title IX proposal. The National Education Association (NEA) voiced its opposition to a proposal from the U.S. Department of Education (DOE) released in November, saying it would weaken protections for sexual assault and harassment survivors in K-12 schools as well as colleges and universities. "Title IX is intended to ensure that all students have access to educational opportunities and that sex discrimination—including sexual violence and harassment—at educational institutions violates federal law, NEA President Lily Eskelsen Garcia said. "But [DOE Secretary] Betsy DeVos seeks to turn Title IX on its head."

SEIU calls asylum proclamation brutal violation. Rocio Saenz, iAmerica Action president and international executive vice president of the Service Employees International Union (SEIU), in November criticized President Donald Trump's proclamation and new rule making migrants ineligible to seek asylum if they cross the border illegally. Calling the action an effort to ignite fear and racial panic, Saenz said Trump should support families who are fleeing to protect their children from violence. "This effort to eviscerate asylum protections and send people back to their death is a shameful, brutal violation of American law, American values, and international treaties the U.S. signed decades ago." ✤

When an employee is employed in both a tipped job and a nontipped occupation, a tip credit is available only for the hours the employee spends in the tipped occupation. An employer may take a tip credit for time a tipped employee spends performing duties related to the tipped occupation, even though the duties may not produce tips. For example, a server who spends time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is engaged in a tipped occupation even though those duties do not produce tips. However, if a tipped employee spends a substantial amount of time (more than 20 percent in his workweek) performing nontipped duties, a tip credit may not be taken for time spent on those tasks.

The WHD issued an administrator's opinion letter on November 8, 2018, further delineating when a tip credit may be used for employees that are engaged in dual jobs with both tipped and nontipped duties.

Service charges

A compulsory charge for service (e.g., a charge placed on a ticket when the number of guests at a table exceeds a specified limit) is not a tip. Service charges cannot be counted as tips, but they may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips when a compulsory service charge is added, the tips may be considered in determining whether he is a tipped employee and in applying the tip credit.

If tips are charged on a credit card and the employer must pay the card company a fee, the employer may deduct the fee from the employee's tips. Further, if an employee does not receive enough tips to make up the difference between the direct (or cash) wages (which must be at least $5.44 per hour in Florida) and the minimum wage, the employer must make up the difference. If an employee receives only tips and isn't paid a cash wage, the employer owes the full minimum wage.

Deductions

Deductions from an employee's pay for walkouts, breakage, or cash register shortages that reduce her wages below the

minimum wage are illegal. If a tipped employee is paid $5.44 per hour in direct wages and the employer claims the maximum tip credit of $3.02 per hour, no deductions can be made without reducing the employee's pay below the minimum wage (even if the employee receives more than $3.02 per hour in tips).

The regulations state that if a tipped employee is required to contribute to a pool that includes employees who don't customarily and regularly receive tips, the employee is owed all tips she contributed to the pool and the full $8.46 Florida minimum wage.

Computing overtime for tipped employees

If an employer takes a tip credit, it must calculate overtime based on the full minimum wage, not the lower direct wage. The employer may not take a larger tip credit for overtime hours than for straight-time hours. For example, if an employee works 45 hours during a workweek, he is owed 40 hours at $5.44 in straight-time pay and five hours of overtime at $8.16 per hour ($5.44 × 1.5 = $8.16 in direct wages).

Final note

The National Restaurant Association, along with several other groups, filed suit against the DOL, seeking to overturn the regulations. The U.S. Supreme Court, however, allowed the rules to take effect.

FAMILY AND MEDICAL LEAVE

How to claim paid family and medical leave tax credit

The tax reform law passed late last year contained a little-noticed tax credit for employers that provide employees paid "family and medical" leave and meet certain other requirements. While the IRS hasn't finalized regulations pinning down the specifics of the new credit, it recently issued some helpful guidance. Let's take a look.

Core requirements

In general, the law offers employers a tax credit of up to 25% of the amount of compensation paid to "qualifying employees" under a written paid family and medical leave policy. The credit is available only to employers that (1) provide at least two weeks of paid leave annually for all employees and (2) pay at least 50% of an employee's normal wage during the leave. In addition, employers don't have to be covered by the Family and Medical Leave Act (FMLA) to claim the credit.

The credit starts at 12.5% of employee wages paid and increases by 0.25% for each percentage point by which they exceed 50% of the employee's normal wage. The maximum allowable credit is 25% of compensation paid to qualifying employees.

While the law doesn't require employers to provide paid leave, it does place substantial restrictions on the circumstances in which the credit may be claimed by those that do. The main restrictions to keep in mind include:

- The maximum period of paid leave for which the credit may be claimed is 12 weeks.
- In general, the credit can't be claimed for compensation paid to employees who made more than $72,000 in the year before the leave was taken.
- The employer must have a written policy under which paid leave is available for one or more FMLA-qualifying reasons. If employees could use the leave for non-FMLA purposes (such as paid time off or paid sick leave), the credit doesn't apply.
- The policy must grant paid leave to any employee who has worked for the employer for at least 12 months, including part-time employees on a prorated basis.
- Leave benefits that are paid for or mandated by a state or local government don't qualify for the credit.
- At this time, the credit is available only for paid leave taken during the 2018 and 2019 taxable years. Like many other tax provisions, however, it could be extended in the future.

Modifying and adopting a policy

What if you want to claim the credit for paid leave taken by employees in 2018 but don't yet have a policy? You may need to move fast, especially if you use the calendar year as your taxable year. The guidance says a written policy must be in place by the end of the 2018 taxable year. To accomplish that, you need to (1) make the policy retroactive to the first day of your 2018 taxable year (usually January 1, 2018) and (2) make sure all employees who took qualifying leave during the year were actually paid for it (even if that means paying them after the fact). Another option would be to implement a policy only for 2019.

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Finally, while the policy must contain specific provisions, the IRS guidance (oddly) says there is no requirement to provide employees any notice of the policy. This gives rise to the possibility that you could have a "published" policy explaining your leave benefits to employees and a separate internal policy that governs your use of the tax credit.

Next steps

Here are some steps you should consider taking:

(1) Identify any paid leave you already offer to determine whether it could qualify for (or be modified to qualify for) the credit. The guidance says the credit may be available for short-term disability benefits, so take a close look at those as well.

(2) Assess whether it's worthwhile to modify your existing policy retroactively (for example, by offering paid leave to part-time employees and retroactively paying them the appropriate prorated benefits).

(3) Consider whether to adopt an entirely new paid leave policy that would qualify for the credit. While this is less likely to be practical for the January 2018 taxable year (because you would have to retroactively compensate all qualifying employees who took the leave in 2018), it may still be worthwhile for 2019.

(4) Consult IRS Notice 2018-71 and your attorney for additional information and guidance. ✤

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