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Legal Sidebar

Drug Testing Unemployment Compensation Applicants & the Fourth Amendment

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On October 4, 2019, the Department of Labor (DOL) published final regulations to guide states on how to design and implement drug testing programs in accordance with Section 303 of the Social Security Act. Congress amended Section 303 in 2012 to clarify that nothing in federal law prevents states from testing two groups of unemployment compensation (UC) applicants for illicit drug use: (1) those "terminated from employment with [their] most recent employer (as defined under the State law) because of the unlawful use of controlled substances" (hereinafter referred to as the "previously terminated" group), and (2) those who are suited to work "in an occupation that regularly conducts drug testing" (hereinafter referred to as the "regularly tested occupation" group). State-implemented UC drug testing programs will likely evoke constitutional considerations under the Fourth Amendment, which protects against unreasonable government searches.

This Sidebar begins with a general overview of the Fourth Amendment and then reviews three Supreme Court opinions addressing the constitutionality of drug testing programs in the employment context, as well as two lower court cases involving similar state laws that conditioned the receipt of federal benefits on passing drug tests. The post concludes with an assessment of factors that might affect the constitutionality of a UC drug testing program in light of the Fourth Amendment. (Additional legal and policy issues raised by DOL's drug testing regulations are discussed in this CRS report.)

Fourth Amendment Overview

The Fourth Amendment protects the "right of the people" to be free from "unreasonable searches and seizures" by the federal government. Although Fourth Amendment protections do not extend to purely private action, the Supreme Court has held that its protections apply to state and local action through the Due Process Clause of the Fourteenth Amendment. Governmental conduct generally has been found to constitute a "search" for Fourth Amendment purposes where it infringes "an expectation of privacy that

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society is prepared to consider reasonable." The Court has held on a number of occasions that government-administered drug tests are searches under the Fourth Amendment. Therefore, the constitutionality of a governmental program that requires an individual to pass a drug test to receive UC likely would turn on whether the drug test is reasonable under the circumstances.

Whether a search is reasonable depends on the nature of the search and its underlying governmental purpose. Reasonableness under the Fourth Amendment generally requires individualized suspicion, which often, particularly in the criminal law enforcement context, takes the form of a court-issued warrant based on probable cause that a legal violation has occurred. The purpose of a warrant is to ensure that government-conducted searches are legally authorized, rather than "random or arbitrary acts of government actors." However, the Court has held that a warrant is not "essential" under all circumstances to make a search reasonable, particularly when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

The Court has noted, for instance, that "the probable-cause standard . . . may be unsuited to determining the reasonableness of administrative searches" that are conducted for purposes unrelated to criminal investigations. For these noncriminal, administrative searches, courts typically employ a reasonable suspicion standard, which is "a lesser standard than probable cause." The Court has "deliberately avoided reducing [the reasonable suspicion standard] to a neat set of legal rules," but at a minimum, the standard requires that, in light of the "totality of the circumstances," there is a "particularized and objective basis," beyond "a mere hunch," that a search would uncover wrongdoing.

Additionally, while a search generally must be based on "some quantum of individualized suspicion" to be reasonable under the Fourth Amendment, the Court has held that "a showing of individualized suspicion is not a constitutional floor." "In limited circumstances," when a search imposes a minor intrusion on an individual's privacy interests, while furthering an "important government interest" that would be undermined by requiring individualized suspicion, "a search may be reasonable despite the absence of such suspicion."

The Court has recognized an exception to the typical individualized suspicion requirement "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," and the government's needs outweigh privacy interests invaded by a search. With respect to drug testing specifically, the Court noted that "[o]ur precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest." The Court has recognized two categories of "special needs" substantial enough to justify suspicionless drug testing: in the employment context, where individuals perform activities involving matters of public safety, and the public school setting, where the government is responsible for the health and safety of children.

In instances where the government argues that "drug tests 'fall within the closely guarded category of constitutionally permissible suspicionless searches,'" courts determine whether such searches are reasonable under the circumstances by balancing the competing interests of the government conducting the search and the private individuals who are subject to the search. Thus, even if special needs exist, government-mandated searches could still run afoul of the Fourth Amendment if they are excessively intrusive or otherwise significantly invade the privacy interests of affected individuals.

The Court has assessed the constitutionality of governmental drug testing programs in a number of contexts. Three opinions in the employment context seem especially relevant to the question of whether a mandatory, suspicionless drug test for the receipt of UC would be considered an unreasonable search in violation of the Fourth Amendment. Additionally, two lower court cases, in which state laws that established mandatory, suspicionless drug testing programs as a condition to receiving Temporary Assistance for Needy Families (TANF) (formerly welfare) benefits were successfully challenged on

Fourth Amendment grounds, could provide relevant insight into how future courts might assess the constitutionality of a UC drug testing program. These five cases are assessed in turn.

Supreme Court Drug Testing Precedent

In *Skinner v. Railway Labor Executives Association*, the Court upheld as reasonable under the Fourth Amendment Federal Railroad Administration (FRA) regulations that required breath, blood, and urine tests of railroad workers involved in train accidents. The Court held that the "special needs" of railroad safety—for "the traveling public and the employees themselves"—made traditional Fourth Amendment requirements of a warrant and probable cause "impracticable" in this context. According to the Court, covered rail employees had "expectations of privacy" as to their own physical condition that were "diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety," and the utilized testing procedures "pose[d] only limited threats to the justifiable expectations of privacy of covered employees." In these circumstances, the majority held, it was reasonable to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.

In *National Treasury Employees Union v. Von Raab*, which was handed down on the same day as *Skinner*, the Court upheld suspicionless drug testing of U.S. Customs Service personnel who sought transfer or promotion to certain "sensitive" positions—i.e., those that require carrying guns or are associated with drug interdiction. The Court concluded that covered employees had "a diminished expectation of privacy interests" due to the nature of their job duties. Additionally, the applicable testing procedures were minimally invasive on privacy interests because employees were provided advanced notice of testing procedures; urine samples were only tested for specified drugs and were not used for any other purposes; urine samples were provided in private stalls; employees were not required to share personal medical information except to licensed medical professionals, and only if tests were positive; and the testing procedures were "highly accurate." Therefore, the Court held that the suspicionless drug testing program was reasonable under the Fourth Amendment.

In contrast, the Court in *Chandler v. Miller* struck down a Georgia statute requiring candidates for certain elective offices be tested for illicit drug use. The majority opinion noted several factors distinguishing the Georgia law from drug testing requirements upheld in earlier cases. First, there was no "fear or suspicion" of generalized illicit drug use by state elected officials. The Court noted that, while not a necessary constitutional prerequisite, evidence of historical drug abuse by the group targeted for testing might "shore up an assertion of special need for a suspicionless general search program." In addition, the law did not serve as a "credible means" to detect or deter drug abuse by public officials because the timing of the test was largely controlled by the candidate rather than the state and legal compliance could be achieved by a mere temporary abstinence. Finally, the "relentless scrutiny" to which candidates for public office are subjected made suspicionless testing less necessary than in the case of safety-sensitive positions beyond the public view. The *Chandler* Court went on to stress that searches conducted without individualized suspicion generally must be linked to a degree of public safety "important enough to override the individual's acknowledged privacy interest" to be reasonable. The *Chandler* Court seemed to indicate that "where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."

Lower Court Cases Involving TANF Drug Testing

The federal district court ruling in *Marchwinski v. Howard*, which was affirmed without opinion by the U.S. Court of Appeals for the Sixth Circuit as a result of an evenly divided en banc panel, involved a state program requiring the suspicionless drug testing of TANF applicants. The district court in *Marchwinski* stated that "suspicionless drug testing is unconstitutional if there is no showing of a special need [] that . . . [is] grounded in public safety." According to the *Marchwinski* court, the state's "primary justification . . . for instituting mandatory drug testing is to move more families from welfare to work." This legislative

objective, however, is not "a special need grounded in public safety" that would justify a suspicionless search, in the court's view. The court also noted that allowing the state to conduct suspicionless drug tests in this context would provide a justification for conducting suspicionless drug tests of all parents of children who receive governmental benefits of any kind, such as student loans and a public education, which "would set a dangerous precedent." Thus, the court granted the plaintiffs' motion for a preliminary injunction, concluding that the "Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim." The state subsequently agreed to halt suspicionless drug testing.

In another TANF case, *Lebron v. Secretary, Florida Department of Children and Families*, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously affirmed a district court's ruling that a mandatory drug testing law applicable to TANF beneficiaries in Florida was unconstitutional. While "viewing all facts in the light most favorable to the State," the panel concluded that "the State has not demonstrated a substantial special need to carry out the suspicionless search." The panel also determined that the state had not provided evidence to support the notion that drug use by TANF recipients was any different than that of the Florida population at-large, and even if it had, this "drug-testing program is not well designed to identify or deter applicants whose drug use will affect employability, endanger children, or drain public funds." The state did not seek en banc or Supreme Court review.

Applicability of Case Law to UC Drug Testing

Whether a government drug testing program comports with the Fourth Amendment may depend largely on the program's purpose and scope. Supreme Court precedent indicates that drug testing programs unrelated to criminal law enforcement, that only authorize testing based on an individualized, reasonable suspicion of drug use—such as through direct observation of an individual's drug impairment by trained personnel at a UC application site—are more likely to comport with the Fourth Amendment. In the absence of suspicion, the Court has held that governmental drug tests must promote "special needs" compelling enough to outweigh the privacy interests of the individuals subject to the test.

Although not dispositive, Supreme Court case law also suggests that suspicionless drug testing programs imposed on a subset of the population that has a "demonstrated problem of drug abuse" may help tilt the balancing test in the government's favor, especially if the testing program is designed to address the problem effectively. Moreover, drug testing programs that require results to be kept confidential to all but a small group of non-law enforcement officials, are not conducted for criminal law enforcement purposes, and only minimally affect an individual's life are more likely to be considered reasonable. On the other hand, programs that allow drug test results to be shared, especially with law enforcement, or that otherwise have the potential to impact negatively multiple or significant aspects of an individual's life, may be less likely to be considered reasonable.

Given this case law, the constitutionality of a UC drug testing program will likely depend on how the program is structured. Additionally, the constitutional analysis might vary as it applies to each of the two categories of UC applicants that states are permitted to test under Section 303 of the Social Security Act. Specifically, the testing of "previously terminated" UC applicants could be based on individualized suspicion, whereas "special needs" analysis might be relevant to UC applicants in a "regularly tested occupation." The remainder of this Sidebar addresses these potentially constitutionally significant characteristics of any UC drug testing program.

Individualized Suspicion and "Previously Terminated" Applicants

The reasons why an individual falls into the "previously terminated" category could be relevant to a reasonable suspicion analysis. DOL's final regulations do not elaborate on how states should define the "previously terminated" group beyond largely repeating the Section 303 statutory language. Consequently, such determinations apparently will be left to the discretion of states. As discussed below,

whether or not there is reasonable suspicion to support testing a particular applicant will likely depend on how the category is defined and the facts and circumstances associated with that applicant's employment termination.

For example, the strength of the evidence tying an individual's termination to illicit drug use might be relevant. If a UC applicant was terminated from his or her previous position because of a criminal drug conviction or because of a failed employer-mandated drug test, there might be more compelling evidence for a reasonable suspicion analysis than if an at-will employee was fired for a number of reasons unrelated to drugs but also, in part, because he or she was rumored to have used illicit drugs outside of work. If a termination was based on the results of an employer-administered drug test, the relative strength of the test results on a reasonable suspicion analysis might be affected by the reliability of the drug test's results, whether or not the test was conducted pursuant to procedures sufficient to ensure urine or blood samples had not been tampered with, and whether or not those who performed the test were adequately trained. A reasonable suspicion analysis might also be affected by the time lapse between the termination and the UC drug test. A court might conclude, for instance, that a UC drug test is less likely to uncover illicit drug use if many months have passed since a UC applicant was fired, than if the termination and test happened within a few days of each other.

Special Needs and the "Regularly Tested Occupation" Group

A special needs analysis could be relevant to mandatory drug testing of UC applicants who fall in the "regularly tested occupation" cohort. The relative strength of a special needs legal defense of such a suspicionless drug testing program would likely depend on how the "regularly tested occupation" group is defined by implementing states. Additionally, there are notable differences between (1) individuals applying for UC benefits while searching for jobs in a "regularly tested occupation" and who are tested for illicit drugs by UC administrators and (2) individuals who are currently performing or in the final stages of being hired to perform safety-sensitive duties and who are drug tested by an employer. As discussed below, whether a reviewing court would consider these distinctions to be constitutionally significant is unclear. The remainder of this section first analyzes potentially relevant factors associated with how states might define the "regularly tested occupation" category, and then assesses the potentially constitutionally relevant distinctions between employer-mandated and UC administrator-mandated drug testing.

In the absence of individualized suspicion, the Supreme Court has cautioned that "where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." Absent a court recognizing a new category of special needs that may outweigh an individual's privacy interests, states, at a constitutional minimum, would likely need to define the "regularly tested occupation" group to encompass only occupations that involve matters of public safety in accordance with the Supreme Court special needs precedent. The "regularly tested occupations" category in the regulations delineates a number of occupations that appear to be in line with those previously upheld under special needs precedent. These include an occupation that requires the employee to carry a firearm and an occupation that is subject to drug testing under Federal Railway Administration, Federal Motor Carrier Safety Administration, Federal Aviation Administration, or Federal Transit Administration regulations.

However, the regulations also do not prohibit states from testing for "[a]n occupation where the State has a factual basis for finding that employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the occupation." As described below, it might be possible for an occupation to fall within the latter category but not comport with current Fourth Amendment precedent.

Because the Fourth Amendment's protections against unreasonable searches and seizures only apply to governmental action, drug testing imposed by private employers "not acting as an agent of the Government or with the participation or knowledge of any governmental official" are completely "unguarded by Fourth Amendment constraints." Consequently, private employers might regularly impose suspicionless drug tests in some occupations that do not involve safety-sensitive special needs because they are not constrained by the Fourth Amendment. However, Fourth Amendment protections would apply to drug tests imposed on the same individuals to the extent they are mandated by a state as part of a UC program. As a result, state programs that require suspicionless drug tests of UC applicants who are suitably employed in occupations that are regularly subject to drug testing by *private* employers but, nevertheless, are not related to public safety functions in accordance with Supreme Court precedent could potentially run afoul of the Fourth Amendment.

However, even if a state's "regularly tested occupation" drug testing program is limited to individuals whose suitable work is grounded in public safety in line with the Supreme Court's special needs jurisprudence, the program might still raise constitutional concerns. UC beneficiaries, unlike the plaintiffs in *Skinner* and *Von Raab*, are not actively performing or directly being considered for employment to perform duties grounded in public safety by the governmental entity that would be administering drug tests tied to the UC program. To the contrary, these individuals would merely be applying for or receiving unemployment benefits while agreeing not to turn down "suitable work" as defined by state law. A reviewing court might find this distinction constitutionally significant and, consequently, consider a UC drug testing program as more akin to the TANF drug testing programs addressed by the *Marchwinski* and *Lebron* courts than to the testing programs upheld in *Skinner* and *Von Raab*. Under this line of reasoning, a reviewing court could potentially conclude that, regardless of how it is structured, the underlying purpose of a UC drug testing program is primarily designed "to promote work . . . and conserve resources" and, consequently, not sufficiently tied to public safety concerns that would warrant a special needs exception to the Fourth Amendment's protection against unreasonable searches.

Other Potentially Relevant Factors

Additional factors that a reviewing court might weigh when balancing the government's interest in conducting a drug test and the individual's competing privacy interests include the prevalence of illicit drug use in the cohort of UC applicants who are subject to suspicionless drug testing; how effectively the drug testing program is designed to identify and eliminate illicit drug use; whether procedural safeguards are in place to ensure that sufficiently trained personnel conduct the test, testing samples are protected from contamination, test results are accurate, and the test subject's medical and other personal information are protected; and the extent to which drug test results are shared beyond the UC program and could negatively affect other aspects of an individual's life. Regarding the latter factor, laws that authorize drug test results to be shared with law enforcement personnel, in particular, might raise heightened Fourth Amendment concerns.