

# **31<sup>st</sup> Annual Civil Service Workshop**

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## ***DRUG TESTING FOR PUBLIC EMPLOYERS***

Presented by:

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**&**

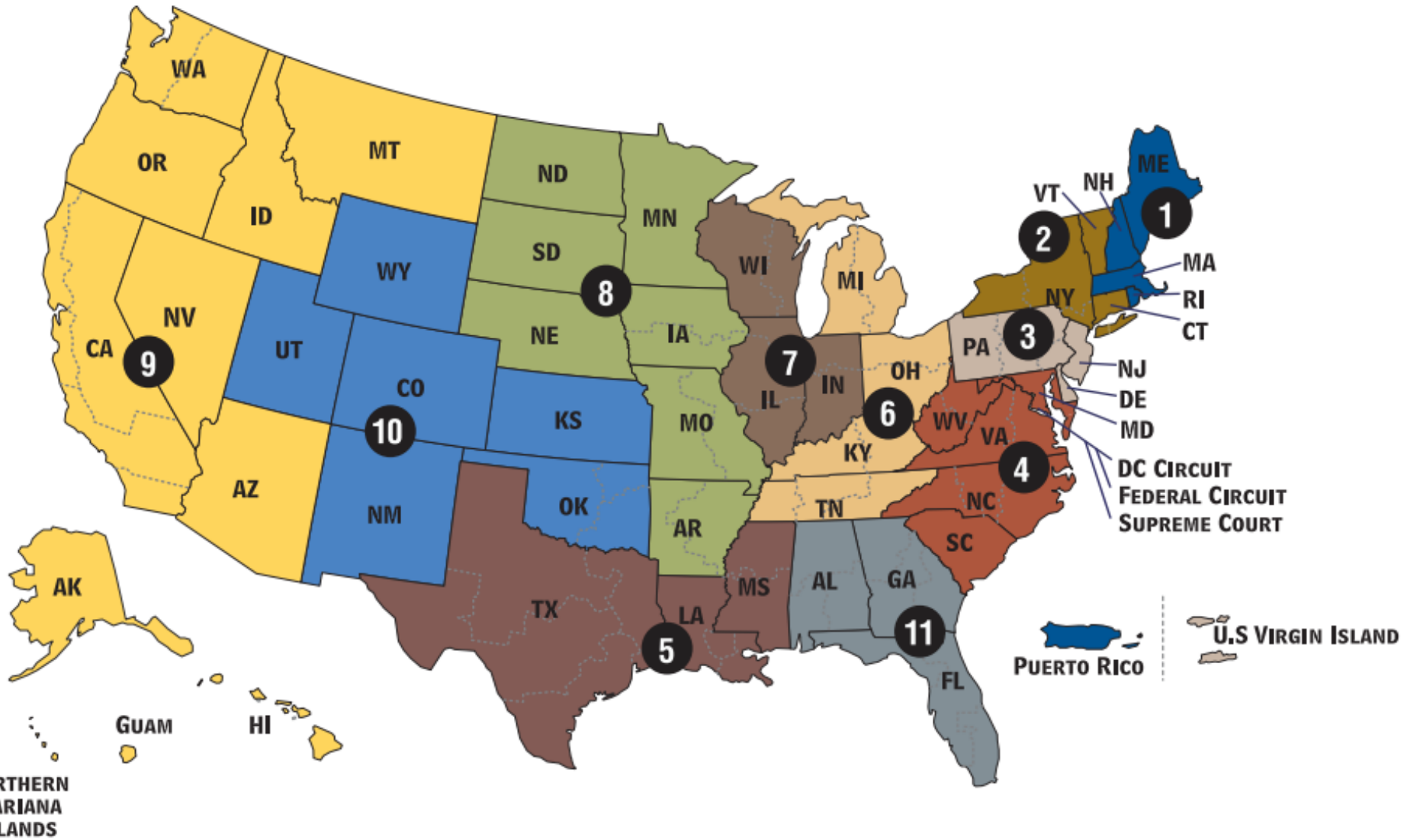
**Joe Gorfida, Jr., Partner, NICHOLS, JACKSON, DILLARD, HAGER &  
SMITH, L.L.P.**

# HOW HAS THE LAW CHANGED FOR PUBLIC EMPLOYERS



# Geographic Boundaries

of United States Courts of Appeals and United States District Courts



# PUBLIC EMPLOYER V. PRIVATE EMPLOYER



# PUBLIC EMPLOYERS

## The 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

# PUBLIC EMPLOYERS

## Drug Tests Are a “Search” Under the 4th Amendment

Must balance individual’s right against the government employer’s legitimate interest in maintaining a drug-free workplace



# PUBLIC EMPLOYERS

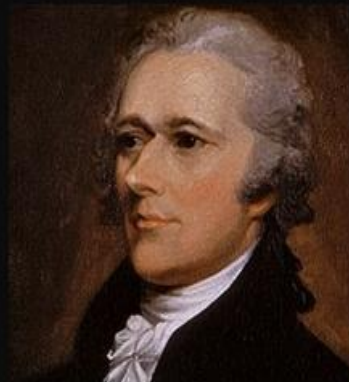
- **Permissible Drug Testing**
  - Random/suspicionless
  - Post-Accident
  - Reasonable suspicion

# RANDOM/SUSPICIONLESS - STRICTEST SCRUTINY

“Strict scrutiny” means that the government employer must have a “compelling reason” to conduct the drug tests on a random/suspicionless basis

***Must Be Able to Articulate the Compelling Reason***

Alexander Hamilton



What is the most sacred duty and the greatest source of our security in a Republic? An inviolable respect for the Constitution and Laws.



# RANDOM/SUSPICIONLESS TESTING ONLY PERMITTED WHEN:

- “Special Need” and/or “Safety-Sensitive”/“Security-Sensitive”
  - *Skinner v. Railway Labor Executives ' Ass 'n.*, 489 U.S. 602, 618 (1989)
  - *Nat 'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989)
- Employers must carefully analyze each position that is being drug tested to determine if it is “safety-sensitive” before continuing to randomly drug test employees

# WHAT IS “SAFETY-SENSITIVE”?

*Skinner* "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences."



# SAFETY-SENSITIVE BREAK UP:

“a position in which a drug impairment constitutes an immediate and direct threat to public health or safety:

- a position that requires the employee to carry firearms, perform life threatening procedures, work with confidential information or documents pertaining to criminal investigations, or confidential juvenile information, or work with controlled substances
- a position in which a drug impairment constitutes an immediate and direct threat to the employee’s health or safety;
- a position in which the employee is responsible for the well-being of another; or
- a position in which a momentary lapse in attention could result in injury or death to another person.”

Police Officers  
Firefighters  
CDL / US DOT



*WHO ELSE?*



Lifeguard?  
Recreation  
Superintendent?  
Building Official?  
Parks/Groundskeepers?

# WHAT IS ENOUGH?

- Driving a City vehicle?
- What if an employee works in a highly regulated area?
- What if an employee is aware/expects he/she could be tested?



# WHOSE RESPONSIBILITY IS IT TO PROVE THAT A POSITION IS “SAFETY-SENSITIVE”?

## THE EMPLOYER’S



# REASONABLE SUSPICION DRUG TESTING

- Based on individualized, articulable observations such as:
  - observation of alcohol or drug use
  - apparent physical state of impairment
  - incoherent mental state
  - changes in personal behavior that are otherwise unexplainable
  - deteriorating work performance that is not attributable to other factors
  - evidence of possession of substances or objects which appear to be illegal or unauthorized drugs or drug paraphernalia

# REASONABLE SUSPICION

- Safety-sensitive? Yes
- Everyone else...?
  - *Nat 'l Treas. Employees Union v. Yeutter*, 918 F.2d 968, 975-76 (D.C. Cir. 1990) “some quantum of individualized suspicion” is required
  - *Hensley v. City of Shreveport*, 2015 US Dist. LEXIS 40784

## Actions/Conduct Triggers Drug Test



# REASONABLE SUSPICION

- *American Federation of Government Employees v. Martin*, 969 F.2d 788 (9th Cir. 1992)
  - Reasonable suspicion could occur by demonstrating “observable phenomena, such as direct observation of drug use or possession and/or physical symptoms of being under the influence of a drug”

# POST-ACCIDENT DRUG TESTING

- Safety-Sensitive? Yes
- Everyone else...?
  - *Bailey v. City of Baytown*, 78 1 F.Supp. 1210, 1216 (S.D. Tex. 1991) employee at wastewater treatment plant had diminished privacy expectation – knew that a drug-testing policy in place
- Some cause or “fault” should be linked to post-accident drug test
  - *United Teachers of New Orleans v. Orleans Parish School Ed.*, 142 F.3d 853 (5th Cir. 1998)
  - *Bryant v. City of Monroe*
  - *Amer. Fed. of Gov't Empl. Local 1533*, 754 F.Supp. 1409 (N.D. Cal. 1990).

# DRUG TESTING APPLICANTS

- Safety-sensitive positions? Yes
  - *Chandler v. Miller*, 520 U.S. 305 (1997)
    - Elected officials-do not have to pass a drug screen to run for office
  - *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008).
    - Library workers: No.

# DRUG TESTING APPLICANTS

- *Am. Fed 'n of State County & Mun. Employees Council 79 v. Scott*, 717 F.3d 851(11th Cir. 2013);
  - Governor wanted to randomly drug test all employees and all conduct pre-employment drug tests for candidates.

**Result: A Qualified “NO”**

# OTHER ISSUES

- Results of drug tests:
  - Confidential medical information-ADA
- Alcohol tests?
  - Job-related and consistent with business necessity (because it's a medical test)

# OTHER ISSUES

- How should the drug test be conducted?
  - Urine?
  - Blood?
  - Breath?
  - Hair?
  - Mouth Swab?



# DRUG TESTING

- Risk analysis
- Consult with your city attorney
- Cities
- Policy

# PUBLIC EMPLOYERS

- Avoid employing/hiring illegal drug users, decrease likelihood of impaired employees in workplace and deterrence
- Permissible under Texas Labor Code §21.120
- Cities must adopt a written policy before drug testing any employee
- Policy should be approved by your city attorney



# CASE STUDIES

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