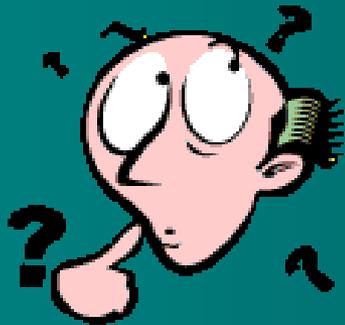


# Drug Testing In Connecticut: Are You Confused Yet?



By:  
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# TRUE OR FALSE #1:

- An employee who is fired for drinking alcohol or using cocaine *on the job* is *not* eligible to receive unemployment compensation benefits.

## TRUE OR FALSE #2:

- You need the permission of the Connecticut Labor Department before you require an employee to submit to *hair* or *saliva* test.

## TRUE OR FALSE #3:

- It is a smart personnel policy to keep a *prospective* employee “honest” during the hiring process by notifying the employee of a drug testing requirement *after offering* him or her employment.

## TRUE OR FALSE #4:

- The Connecticut Labor Department permits employers to *randomly* test employees who have been designated as “high-risk and safety sensitive” by the Department.

## TRUE OR FALSE #5:

- A “painter” may be considered a “high-risk and safety sensitive” occupation.

## TRUE OR FALSE #6:

- The *weight* of a truck is an important factor in deciding whether you can *randomly* test the driver of a truck.

# TRUE OR FALSE #7:

- It is *reasonable* and *legal* to test an employee for drugs/alcohol after the employee is involved in an *accident at work* provided the employer has a drug testing policy permitting such a test.

## TRUE OR FALSE #8:

- You have *reasonable suspicion* to drug test an employee on Monday morning after reading in the Sunday paper that he or she was arrested for drug possession.

## TRUE OR FALSE #9:

- You have *reasonable suspicion* to drug test an employee who you observe *possesses* 2 bags of marijuana on the employer's premises.

# TRUE OR FALSE #10:

- The subject of drug testing is easy to understand.

# Contact Information

- ☉ Steve Lattanzio (860)263-6755;
- ☉ Connecticut Labor Department WEBSITE:  
[www.ctdol.state.ct.us](http://www.ctdol.state.ct.us)

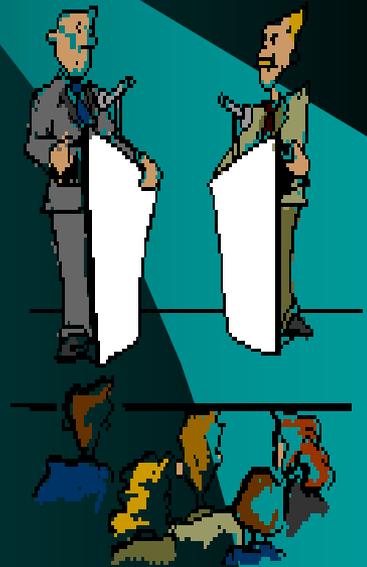
# Agenda

## ◉ 1<sup>st</sup> Hour: Agency Overview

- ◉ Pre-employment and Random Testing
- ◉ Practical Examples
- ◉ Questions May Be Asked

## ◉ 2<sup>nd</sup> Hour:

- ◉ Reasonable Suspicion
- ◉ Unemployment Implications
- ◉ Medical Marijuana



# Introduction

- Complicated Subject Matter: Not all questions have answers
- General Labor Department Jurisdiction and Enforcement Policies
  - “Method to the Madness”

# Topics

- Discussion of 3 Most Common Drug Testing Statutes
  - Pre-employment – 31-51v
  - Random – 31- 51x(b)
  - Reasonable Suspicion – 31-51x(a)
- Post-Accident Testing (*Doyon Case*)
- Waivers
- Unemployment Insurance Implications



# What this Program is *NOT*:

- ⦿ The answer to all of your questions; or
- ⦿ A substitute to becoming informed about the subject matter; or
- ⦿ A substitute for your *own* attorney's advice; or
- ⦿ A solution to your primary goal: “How can I avoid a lawsuit?”

# What This Program *Is*:

- A discussion of Topical Drug Testing Issues from the Labor Department's perspective; and
- A practical source of information;
- A good *starting point* on the subject; and
- A source for *future dialogue* – please inform us of any interesting cases you encounter.

# Overview

- Connecticut *State* Law Requirements:  
Regulated by 31-51t to 31-51aa, inclusive
- *Federal* Law Requirements
- Interaction Between State and Federal
- Two Prominent Court Decisions:
  - *Doyon v. Home Depot U.S.A., Inc.*, 850 F.Supp. 125 (D.Conn.1994); and
  - *Poulos v. Pfizer, Inc., et al.*, 244 Conn. 598 (1998).

# Jurisdiction of the Connecticut Labor Department

## State statutes regulate:

- *Current, prospective* or *former* employees;
  - Not only those currently within employ; and
- *Employers* who utilize *urinalysis* drug testing:

Does *not* apply to:

- Breath testing;
- Hair testing;
- Blood testing;
- Saliva testing; or
- Other specimen testing (all of which are conducted at the *employer's own risk*).



# Jurisdiction of the CTDOL (Cont'd.)

- Statutes apply to “employers”
- Conn. Gen. Stat. § 31-51t(2) provides:
  - “Employer” means any individual, corporation, partnership or unincorporated association, excluding the state or any political subdivision thereof.

# Jurisdiction of the CTDOL (Cont'd.)

- Statutes specifically *exclude* from the definition of the term “employer:”
  - Employees of the *State of CT* or any *political subdivision* thereof;
  - And possibly by interpretation:
    - *3<sup>rd</sup> party client employers* of temporary employees;
    - *3<sup>rd</sup> party general contractors*
- Make this a threshold inquiry (on hard cases)

# Pre-Employment Drug Testing:

◉ Statute: Conn. Gen. Stat. Sec. 31-51v:

No *employer* may require a *prospective employee* to submit to a *urinalysis* drug test as part of the *application procedure for employment* with such employer *unless*

(1) the prospective employee is *informed in writing* at the *time of application* of the employer's intent to conduct such a drug test;

# Pre-employment Statute (Cont'd)

(2) such test is *conducted in accordance with the requirements of subdivisions (1) and (2) of subsection (a) of section 31-51u [methodology]*; and

(3) the prospective employee is *given a copy of any positive urinalysis drug test result*. The results of any such test shall be *confidential* and shall *not* be disclosed by the employer or its employees to any person other than any such employee to whom such disclosure is necessary.

# Pre-employment Nuances:

Definition of “*Prospective Employee*” –  
Conn. Gen. Stat. Sec. 31-51t(3)

...any individual *applying for* employment  
...*other than* an individual who terminated  
his employment with such employer *within*  
*12 months prior to* the application.

# Pre-employment Nuances:

- Must be conducted during the “*application procedure*”
- *Safest Approach*: Individual must *not have commenced employment* as of the time employer requests drug test.
  - What if laboratory processing test is experiencing delays, can the employer allow the individual to commence employment before the results are known?

# ***Federal*** law on safety-sensitive employees:

- Employee *cannot* commence s/s duties *before* test results are received
  - *See* 49 CFR 382.301(a)
- Laws are silent on performance of *non*-safety sensitive functions before test results are received.
  - Therefore, most likely permitted.
  - Unemployment Insurance consequences.

(1)

# Pre-employment Nuances

- Cannot test *current* employees (or persons who worked within 12 months)
- Example: If employer seeks to adopt new pre-employment policy, it may *not* test *existing* employees.
- Practical Advice: May be able to obtain the *consent* of the employees, e.g., *waiver*.

# Pre-employment Nuances

- ◉ Reminder: An applicant who *worked for the employer within 12 months* is *not* considered to be a “prospective employee.”
- ◉ Such an applicant would meet the definition of “*employee*” by 31-51t(1).

# Pre-employment Nuances

## ◉ *Temporary Employment Agencies*

- ◉ cannot test “employees” already on their personnel rolls.
- ◉ Even at the request of a 3<sup>rd</sup> party client employer, e.g., Casino.
- ◉ However, the 3<sup>rd</sup> party client employer may conduct a test (at its own risk) because it is not the “employer.”

# Usual Scenario:

	<i>Actual Employer</i>	<i>Host Employer</i>
	ABC Corp.	“Casino”
<i>Pre-employment</i>	YES	N/A
<i>Current Employee</i>	NO (=actual employer )	YES (not an employer )

# Pre-employment Nuances

## ◉ *Successor Employers*

- ◉ Issue: Are *retained* employees of a *former entity* considered “new” employees?
- ◉ Answer: Depends on facts – *to the extent that the employees are required to act like new employees*, e.g., fill out new job applications, negotiate new wage rates, obtained new benefits and seniority rights, etc, they may be considered “new” employees.
- ◉ (Form over substance?)

# Pre-employment Nuances



## ◦ Required by State Law

- School Bus Operators by Conn. Gen. Stat. Sec. 14-276a(d):
  - “A carrier shall require each person whom it intends to employ to operate a school bus... or school transportation vehicle... to submit to a urinalysis drug test in accordance with § 31-51v...”
  - *Expanded* in 2007 to *require random* testing of employees in addition to pre-employment testing

# Commercial Motor Vehicle

## ◉ *Required by Federal and State Law*

- ◉ Drivers of *Commercial Motor Vehicles*, e.g., CDL drivers
- ◉ Prior to the first time a driver performs safety sensitive functions
- ◉ *See* 49 C.F.R. 40, Sec. 382.301; Conn. Gen. Stat. § 14-261b

# Commercial Motor Vehicle

- Defined in Conn. Gen. Stat. § 14-1(a)(11) as:
  - A vehicle designed or used to transport passengers... which (A) has a gross vehicle *weight rating of  $\geq 26,001$  pounds*; (B) is designed to *transport  $\geq 16$  passengers*, including the driver, or is designed to transport *> 10 passengers*, including the driver, and is used to transport *students* under the age of 21 to and from school...

# Random Testing

- What is it?
  - Random in 2 respects:
    - As to *individuals* selected; and
    - As to the *timing* of the test with *no advance notice*
- *Codified* in Conn. Gen. Stat. Sec. *31-51x(b)*

# Random Testing

- Permissible Under *State* Law:
  - If also authorized by *federal* law; or
  - Where employee serves in *high-risk or safety sensitive occupation* (as designated by the Labor Commissioner); or
  - Where conducted as part of an *employee assistance program* (“*EAP*”) in which the employee voluntarily participates; or
  - Conn. Gen. Stat. Sec. 14-261b (see next slide)

# *Permissible* Random Testing Under State Law

## ◦ Conn. Gen. Stat. Sec. 14-261b

- *Requires* testing of drivers *commercial motor vehicles* ( $\geq 26,001$  lbs.) who operate in intrastate commerce

## ◦ *Permits* testing of :



- *Drivers* of certain vehicles weighing  $\geq 10,001$  lbs, but  $\leq 26,000$  lbs.
- *Mechanics* of “such” vehicles; and
- *Forklift operators.*

# § 14-261b Nuances

- Motor Vehicle Department Statute
- Defines “employer” as “person employing or contracting a *driver*”
- Permits testing of *lesser* weighted vehicles than commercial motor vehicles
- Also permits testing of *mechanics* of “such a vehicle”
- Also permits testing of *forklift operators* – but *not* of “such a vehicle”

# *Mandatory* Random Testing

◉ Authorized By *Federal* Law

◉ *Mandatory* Testing by agencies like:

- DOT (Dept. of Transportation), e.g., CDL
- FHWA (Federal Highway Administration)
- FAA (Federal Aviation Administration)
- FTA (Federal Transit Authority)
- FRA (Federal Railroad Authority)
- Coast Guard
- Dept. of Energy
- Nuclear Regulatory Commission



# *Mandatory* Random Testing

- **Most Common Example of Federal *Mandatory* Testing:**

- CDL Drivers – *see* 49 C.F.R. 40, Sec. 382
- Extensive federal regulations regarding methodology and process



# *Permissible* Random Testing Under *State* Law

## ◉ *High-Risk/Safety Sensitive Occupation*

- ◉ Designated by the Labor Department
- ◉ *See* Conn. State Agencies Regulations Sec. 31-51x-1 through 8 for procedure by which to request the designation
  - *See* CTDOL website: [www.ctdol.state.ct.us](http://www.ctdol.state.ct.us)
  - *See* handout.

# High-Risk/Safety Sensitive Occupation Details



- Definition: An occupation which:
  - Presents a *clearly significant life threatening danger* to the employee, his fellow employees, or the general public; *and*
  - Requires *the exercise of discriminating judgment* or high degree of care and caution; *and*
  - Is separate from the ability to discern impaired or enhanced performance by direct supervision.

# *High-Risk/Safety Sensitive Occupation Details*

- Occupation *may* receive the designation after:
  - a written request for designation is filed with Labor Commissioner by an *employer, employee, or employee's representative*; and
  - *Investigation* by Labor Department; and
  - *Approval* by Labor Department.

# High-Risk/Safety Sensitive Occupation Details

- Designation applies specifically to the *employer* and *not* the profession in general
- Example: Painter
  - Although not inherently high-risk as a profession, it may be so designated if painter engaged in painting highway bridges or at tall heights.
  - Assembly line manufacturer of police/fire products is *not* high risk.



# Employee Assistance Programs (“EAP”)

◦ *Permissible* random testing under *state* law *only* if :

- EAP is *sponsored or authorized* by the employer;  
*and*
- The employee is *voluntarily* participating in the program.



# Reasonable Suspicion Testing

- *Permissible Testing Under State and Federal Law*
  - *Not Mandatory* – Employer *not* required to administer by any state statute
  - *Practical Advice*: *An employer may incur unnecessary legal liability by conducting any impermissible drug test, when employer could avoid such exposure by invoking ordinary discipline as a substitute.*
    - *Proof of impairment on job is enough*

# Reality check:

- Reminder: *Degree of Invasiveness*
- Would you put contents of pocketbook or wallet on desktop?
- Drug or Alcohol Testing – we are talking about *bodily fluids*

# Reasonable Suspicion Testing

- *Doyon v. Home Depot U.S.A., Inc.*, 850 F.Supp. 125 (D.Conn.1994) is best description of this type of testing.
- *Doyon* Highlights:
  - State statute protects *privacy interests* of employees;
  - Analogous to privacy protections afforded by the *4<sup>th</sup> Amendment*, e.g., freedom from unreasonable searches and seizures by *government* entities;
  - CT legislature intended to extend *4<sup>th</sup> Amendment* protections to *private* sector by statute.

# Reasonable Suspicion Testing

## *Doyon* Highlights (Cont'd.)

- Requires “*individualized reasonable suspicion.*”
  - Case law definition
    - *Specific and articulable facts* which, taken together with *rational inferences* from those facts, warrant the search. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968).

# Reasonable Suspicion Testing

Conn. Gen. Stat. Sec. 31-51x(a) provides:

- No employer* may require an employee to submit to a *urinalysis* drug test unless the employer has *reasonable suspicion* that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.



# Reasonable Suspicion Testing

## State Statute Highlights:

### Language is in **present tense**

- ...that employee *is* under the influence...
- ...which adversely *affects* or could adversely affect employee's job performance ...

### Significance:

- Employer's *belief* must be *contemporaneous* with its *request* that employee submit to testing

# *Reasonable Suspicion*

## Testing – State Statute

### Highlights (Cont'd.):

#### ◉ Examples:

- ◉ Observations by employer 3 days *earlier* do not support reasonable suspicion on the *4<sup>th</sup>* day;
- ◉ Employee's arrest over the weekend *for conduct 7 days prior* does *not* support reasonable suspicion on first day back to work.

# *State Statute* Highlights:

- ⦿ Connecticut Labor Department attempted to define “Reasonable Suspicion” by proposed regulations in 1996 (*see* handout)
- ⦿ Standard proved too difficult to define
- ⦿ Unable to reach consensus, (e.g., whether *employee possession* is basis for testing.)

# Symptoms Which *May* Give Rise to *Reasonable Suspicion*

- On-the-job use
- Strong breath odor;
- Strong breath, hair, hands, clothes odor
- Glassy/watery eyes
- Red/bloodshot eyes
- Dilated pupils
- Swollen eyelids
- Flushed face color
- Unsteady gait
- Slurred speech
- Unusual sweating
- Disorientation
- Inappropriate or aberrant behavior
- Personality changes
- Erratic operation
- **ANY OF ABOVE IN COMBINATION**

# *State Statute* Reasonable Suspicion Highlights:

## Practical Advice:

- Compile a *checklist* with the above symptoms to be checked by observers.
- Provide *training* to supervisors who make the observation of symptoms
  - May increase the likelihood of identifying circumstances of reasonable suspicion.
  - May limit employer's exposure to liability.

# Post-Accident Testing (State)

- Outlawed by *Doyon v. Home Depot* case
- No “individualized reasonable suspicion” based on occurrence of an accident.
- Example: Ceiling falls on construction worker with bloodshot eyes and odor of alcohol resulting in concussion/head injuries – reasonable suspicion to test?

# Question to Ponder:

◦ May an employer conduct a *post-accident* drug or alcohol test in Connecticut using *hair-testing*?

◦ Reminder: CTDOL's jurisdiction is limited *solely* to urinalysis testing.

- No CTDOL enforcement

◦ Possibly at the employer's own risk

# Post-Accident Testing (Federal)

- Required by *Federal* Agencies under *narrow circumstances*
  - FMCSA *requires* it if a driver of a commercial motor vehicle is involved in an accident if:
    - (1) ...accident involved the loss of human life; *or*
    - (2) driver receives a citation within 8 hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:
      - (i) Bodily injury to any person who...receives medical treatment away from the scene of the accident; *or*
      - (ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

# Waivers (In General)

## ◉ *Legal Definition:*

- ◉ The intentional or voluntary relinquishment of a known right.

## ◉ *Practical Effect:*

- ◉ Eliminates risk to employer of having to establish legal basis for testing.

## ◉ *4<sup>th</sup> Amendment Impact:*

- ◉ Individuals are permitted to waive their constitutional rights to be free from unreasonable searches and seizures.

# Waivers

- Consult *your attorney* for application of waiver law to your circumstances.
- See *Poulos v. Pfizer, Inc., et al.*, 244 Conn. 598 (1998):
  - Stands for proposition that an employee *may* waive his rights to challenge drug test if waiver is voluntarily given for a legitimate benefit, i.e., the right to remain employed, when the employer has cause for termination without requiring the employee to be drug tested.

# Waivers



## ◦ Checklist:

- Must be given *voluntarily*;
- At time *contemporaneous* to test request;
- In exchange for a *legitimate benefit*;
- *Not* valid if it is a *condition of employment* (see *Doyon v. Home Depot U.S.A.*);
- May be overridden by *evidence of protest* to testing by employee (words and actions) at the time of the request.

# Consent Example: The “UCONN” Employer

- Employer wanted to test “*everyone*” within employ of 300 persons
- CTDOOL could find no legal basis for all
- Employer paid \$10K - \$15K bonus to all employees
- Informed of possibility of conditioning receipt of bonus on consent to test
- Go through factors on previous screen

# Unemployment Compensation

## ◉ Disqualifications:

- ◉ *Mandatory* test with *positive* results;
- ◉ Proof of *impairment on-the-job*
  - No need to test if observations prove impairment
  - Impairment = wilful misconduct
- ◉ *Non-mandatory test* with *positive* results **AND** *proof of impairment*

# Unemployment Compensation Implications – 2 Statutes

- Conn. Gen. Stat. Sec. 31-236(a)(14) – No liability to employer:

- *Mandatory* test with *positive* results;
- Employee is *not* eligible;
- Employer is *not* liable.



- Statutory Language: ...if the administrator finds that the individual has been *discharged or suspended* because the individual has been disqualified under *state or federal law* from performing the work... as a result of a drug or alcohol testing program *mandated by and conducted in accordance with such law*, until such individual has earned at least ten times such individual's benefit rate;

# Mandatory Testing: Conn. Gen. Stat. § 31-236(a)(14)

- Which tests are *mandated*?
  - CDL drivers - *See* 49 C.F.R. 40, Sec. 382.301; Conn. Gen. Stat. § 41-261b
  - School Bus Operators by Conn. Gen. Stat. Sec. **14-276a(d)** (pre-employment and random)

# Conn. Gen. Stat. Sec. 31-236(a)(14) Highlights

- Applies to employees *mandated* to submit to drug testing under *state or federal* law
- If the result of a lawful mandated test is *positive*, the employee is *disqualified* from receiving unemployment compensation benefits.  
(Therefore, no liability to employer.)



- **Important Note:** A positive drug test result from a *mandated* test is sufficient, in and of itself, to result in the disqualification of a claimant.

# Unemployment Compensation Implications

- ◉ Conn. Gen. Stat. 31-225a(C)(1)(E)(ii) – *non-mandatory* testing
- ◉ Statutory language: If the administrator finds that... an individual was discharged for violating an employer's drug testing policy, *provided the policy has been adopted and applied consistent with* sections 31-51t to 31-51aa, *inclusive*, section 14-261b *and any applicable federal law, no benefits paid thereafter* to such individual ... *shall be charged to such employer's account*, provided such employer shall have filed a notice with the administrator within the time allowed for appeal in section 31-241

# Conn. Gen. Stat. 31-225a(C)(1)(E)(ii) Highlights

◦ Applies to *non-mandatory* scenarios, e.g., where employers are permitted to test under state or federal law

◦ Examples:



- Reasonable suspicion
- Random: (1) Sec. 14-261b;
- (3) EAP
- (2) high-risk/safety-sensitive;

# Conn. Gen. Stat. 31-225a(C)(1)(E)(ii) Highlights

## Effect of Statute

- Relieves separating employer of unemployment compensation charges *if*:
    - employer has conducted *lawful permissible drug test* under state or federal law; and
    - test result is *positive*; and
    - employer *cannot* prove claimant's *impairment* on the job.
- \* There is *no* charge relief for *reimbursing employers*, e.g., municipalities, non-profits, etc.

**Important Note:** For *non-mandated* drug tests, a positive drug test result *alone* does *not* result in the disqualification of a claimant. Employer also needs to prove the *impairment* of the claimant.

# Conn. Gen. Stat. 31-225a(C)(1)(E)(ii) Highlights

## ◦ Significance of “Impairment”

- *Nieves v. Boise Cascade Corporation*, Board Case No. 857-87-BR (10/18/94)
- Where the result of a claimant’s permissive drug test is positive, *no disqualification* from unemployment compensation benefits will result unless the positive test results are *corroborated by evidence of impairment*.

# Conn. Gen. Stat. 31-225a(C)(1)(E)(ii) Highlights

## ◦ *Nieves* rationale:

- A urinalysis test will detect traces of marijuana in a person's system for up to *thirty days* after use. The test *cannot* provide more refined information, such as whether the person is under the influence of marijuana or when the person used the substance during the thirty-day period. Medical evidence indicates that *marijuana may impair motor functions for up to twelve hours after its ingestion.*



## *Nieves* rationale (cont'd.)

- Accordingly, because of the inability of the urinalysis drug screening test to determine whether the use of the substance had an *actual on-the-job effect*, i.e., *on-the-job impairment*, the drug test alone cannot show by a preponderance of the evidence that the misconduct of the employee was “*in the course of*” his employment.

# Any UI Questions?

# Other Drug Testing Issues

- Methodology
- Refusals to Submit to Testing
  - Deliberate
  - “shy” bladder
- Employer’s Burden of Proof – *prima facie* case
- Return to Duty Testing
- Agency view of Addiction as Disease



The End!