Drug Testing In Connecticut: Are You Confused Yet?

By: Stephen Lattanzio, Esq.
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

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Agenda

1st Hour: Agency Overview
- Pre-employment and Random Testing
- Practical Examples
- Questions May Be Asked

2nd 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:
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:
    - 3rd party client employers of temporary employees;
    - 3rd 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;
(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.
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 3rd party client employer, e.g., Casino.
- However, the 3rd party client employer may conduct a test (at its own risk) because it is not the “employer.”
Usual Scenario:

<table>
<thead>
<tr>
<th></th>
<th>Actual Employer</th>
<th>Host Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pre-employment</strong></td>
<td>ABC Corp.</td>
<td>“Casino”</td>
</tr>
<tr>
<td><strong>Current Employee</strong></td>
<td>NO (=actual employer)</td>
<td>YES (not an employer)</td>
</tr>
</tbody>
</table>
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**

  
  - “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 ≥ 26,001 pounds; (B) is designed to transport ≥ 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


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

- **Permits** testing of:
  - *Drivers* of certain vehicles weighing ≥10,001 lbs, but ≤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 – 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

- 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* Highlights:
  - State statute protects *privacy interests* of employees;
  - Analogous to privacy protections afforded by the 4th *Amendment*, e.g., freedom from unreasonable searches and seizures by *government* entities;
  - CT legislature intended to extend 4th 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 4th 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.

- **4th 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
- CTDOL 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;

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


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.

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;

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.

- 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*. 

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.**
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!