



New Jersey Law and Workplace Drug Testing: Legal Overview by Nancy N. Delogu, Esq.

Are you familiar with New Jersey's legal requirements with respect to drug testing? The following is a primer on what your business should know, and do, when launching or maintaining a workplace drug testing program.

First, you should know that drug tests are mostly regulated by state law. True, drug and alcohol abusers may have rights under the federal Family and Medical Leave Act and the Americans with Disabilities Act, and some employers have to comply with federal regulations on the testing of transportation workers. For most employers, however, the "who" and "how" of drug testing is governed by state law. That is why an employer with multi-state operations cannot assume that the drug testing policy that it has followed in one state for years will automatically work in any other state in which it has operations.

New Jersey, in fact, is one of about twenty states that has chosen to regulate workplace drug testing. If you understand the reasoning behind this, you will understand the requirements imposed upon in-state employee drug testing programs.

As you may recall from a long-ago civics class or a more recent fondness for reality-based law enforcement television shows, the Fourth Amendment to the United States Constitution prohibits government actors from engaging in "searches" which are "unreasonable." There is a whole body of law that discusses the circumstances in which a governmental entity, acting as an employer, can drug test its employees within Fourth Amendment limits. Speaking generally, drug testing in a government workplace is justified only if the government's need for the test is compelling, as compared to the individual's expectation of privacy. Government actors cannot, for example, test everyone in the workplace as a show of support for drug-free workplace policies, nor may they require employees to submit to random or suspicionless drug tests unless the employee holds a position involving safety or security.

New Jersey, like most states, has a similar prohibition against unreasonable searches in its state constitution.¹ Significantly for private, non-government employers, the New Jersey Supreme Court has declared that the State Constitution represents the public policy of New Jersey with respect to all workplace drug testing.² As a result, the reasonableness of any New Jersey drug testing program is determined by a balancing test in which the employee's (or applicant's) expectation of privacy is weighed against the employer's need for the testing, and the means used to achieve that goal.

In the case of *Hennessey v. Coastal Eagle Point Oil*³, the New Jersey Supreme Court approved random testing of employees who work in safety-sensitive positions. It is not entirely clear, however, whether suspicionless testing of all employees would be justified; the Appellate Division of the New Jersey courts did uphold a pre-hire test of an applicant who had already completed 18 months with the employer as a temporary employee – clearly, another form of suspicionless testing. The *Hennessey* decision certainly suggests, however, that random testing may be permitted only when the employer can articulate an enhanced need for suspicionless testing. Most other types of testing, such as pre-employment, post-accident, and reasonable suspicion testing have not been challenged, as the United States Supreme Court recognized the reasonableness of such tests in the late 1980s.⁴

¹ N. J. Const. art .1, § 7.

² *Hennessey v. Coastal Eagle Point Oil*, 609 A.2d 11 (N. J. 1992).

³ *Id.*

⁴ *National Treasury Employees Union v. Skinner, etc.*

Relevant now, the *Hennessey* decision listed certain minimum standards an employer should follow in administering a workplace drug testing program. First, the employer should use the least intrusive test methods necessary to determine drug use. In addition, the employer must adopt a policy and practice of keeping test results confidential. Employees must be warned about the impending implementation of a testing program, informed who may be subject to testing, explain how samples will be analyzed, and notified of the consequences of testing positive, or of refusing a test.

Somewhat unusually, the Court also stated that it expects employers to warn employees of the lingering effects of drug use. Many employees believe that the effects of illegal drugs have worn off a few hours after use; studies have shown that this often is not the case, particularly with chronic marijuana use. The New Jersey Supreme Court clearly hoped that educating employees about the effects of drug abuse would minimize the incidence of such use. Efforts to educate workers about the dangers of substance abuse clearly are valued.

Unlike some states, New Jersey employees who test positive following a workplace accident may nevertheless be entitled to workers' compensation benefits, because state law requires an employer to show that the injuries were caused by the employee's intoxication or unlawful drug use.⁵

Of course, employees at larger employers may have rights under federal law to take a leave of absence to seek treatment. The federal Family and Medical Leave Act (FMLA) treats both drug addiction and alcoholism a "serious health conditions" for which the eligible employee may be entitled to a job-protected leave of absence to seek treatment.

Significantly, however, the law provides the employee with a right to time off to participate in rehabilitation efforts, and does not provide an excuse for missing work while under the influence of drugs or alcohol.⁶

New Jersey makes it a criminal offense to substitute or adulterate a test specimen. Selling devices or substances designed to substitute or adulterate test specimens is a criminal offense, as is the simple act of possessing such a device or substance.⁷

Finally, employers should be aware that the public policy against workplace drug use that justifies employee testing in the first place also protects employees who report suspected drug use under New Jersey's Conscientious Employee Protection Act. (CEPA). Essentially, those who complain of workplace substance abuse may enjoy "whistleblower" status and may not be terminated for their efforts to report substance abuse.⁸

Required elements of a workplace drug testing program include:

- Notice of the lingering effects of illegal drug use;
- Advance notice of an intent to commence testing employees;
- Notice of how employees will be selected for testing;
- A collection and testing process that is no more intrusive than necessary to determine unauthorized drug use;
- an explanation of how the test sample will be analyzed, including any rights to explain positive results or seek a retest;
- Notice of the consequences of testing positive; or refusing a test and
- Ensuring confidentiality of results

⁵ N.J. Stat. § 34:15-7.

⁶ See *Cole v. ExxonMobil Corp.*, 142 Fed. Appx. 52 (3d Cir. (NJ) 2005).

⁷ New Jersey Statutes Annotated § 2C:36-10 (Supp. 2004).

⁸ *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597 (D.N.J. 2003).

Nancy Delogu is an attorney and shareholder with the employment law firm of Littler Mendelson, P.C. She frequently writes and lectures on legal issues involving employee substance abuse. She can be reached via www.littler.com.

Firmwide:82021481.1 034798.1003

Notice: This article reflects the opinion of the author and does not necessarily reflect the opinion of Partnership for a Drug-Free New Jersey (PDFNJ). This information should not be construed as legal advice from the author or PDFNJ. Please consult your own attorney before making any legal decisions.

**Partnership for a Drug-Free New Jersey
61 Monroe Street, Hoboken, NJ 07030
201-798-7171 Fax. 201-798-6867 www.drugfreenj.org**