



COUNTY ADVISORY BULLETIN

CAB

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PRE-EMPLOYMENT DRUG TESTING

Introduction

The purpose of this County Advisory Bulletin (CAB) is to share with you a copy of a recent informal Attorney General's Opinion regarding the administration of pre-employment drug testing as well as to provide guidance to counties in analyzing which county positions may be subject to pre-employment (post-offer) drug testing. As always, counties are advised to consult their legal counsel should you seek specific legal advice regarding your county's workplace.

Value of a Drug Testing Program in the Workplace

Drug testing in the United States began in the late 1980's with the testing of certain federal employees and specified Department of Transportation regulated occupations.

Today, drug testing in the public workplace may include pre-employment (post offer), reasonable suspicion, post-accident and random testing.

These tests serve as a deterrent as well as a safeguard in protecting the public as well as other employees from circumstances when a co-worker is under the illegal influence of alcohol or drugs. They also serve to protect an impaired employee from him or herself.

A drug testing program is an important component to providing a safe and productive workplace and to protect the public which counties serve. Following are just a few general statistics:

- Nearly 75 percent of illegal drug users are employed, according to the U.S. Department of Health and Human Services.
- The U.S. Department of Labor says about 16 percent of every American company's workforce is impaired by drugs or alcohol. And the Ohio Bureau of Workers' Compensation (OBWC) says employees who use drugs and alcohol are three to four times more likely to have an accident on the job.

- The OBWC reports workers who use drugs and alcohol are absent at least three weeks a year and are tardy three times more often than nonusers. They're also 33 to 50 percent less productive and five times more likely to file a workers' compensation claim.
- The U.S. Small Business Administration says each user costs his or her employer at least \$7,000 a year, while the National Drug-Free Workplace Alliance says the cost to American businesses because of impaired employees totaled \$162 billion in 2000.
- According to the Substance Abuse and Mental Health Services Administration (SAMHSA), among the nation's full-time workers, 42.9 percent reported that tests for illicit drug or alcohol use occurred at their place of employment during the hiring process, or "prehire" testing. This equates to more than 47 million adults who worked in settings where testing for illicit drug or alcohol use occurred during the hiring process.
- Likewise, SAMSHA reports that a total of 29.6 percent, or 32 million, of full-time workers in the United States, reported random drug testing in their current employment setting during the study period.

It is no wonder drug-free workplace programs (DFWP's) are becoming more prevalent in the workplace, as the data above shows the need for such programs. Using drug testing as the cornerstone, a DFWP attempts to create safe work environments for all employees. A DFWP is more than just drug testing, of course. It also includes a written policy, employee education, supervisor training and access to assistance for addicted employees. Program components are intended to provide a safe job site, protect the residents that counties serve, discourage alcohol and drug use and encourage treatment, recovery and a return to work.

Informal Attorney General's Opinion

Exhibit 1 of this memo is a copy of "informal guidance" that the Ohio Attorney General's Office provided to Wayne County Prosecutor Martin Frantz. Exhibit 2 is a letter which the Opinions Section of the Ohio Attorney General has used subsequent to the issuance of the guidance letter to Wayne County.

In Mr. Frantz's request, he asks a series of 8 questions to the Attorney General relating to the institution of drug/alcohol testing of county employees by various county appointing authorities.

The opinion notes that there are numerous court cases "that have addressed different aspects of governmental actors conducting drug or alcohol testing of individuals, including employees.... Because the United States Supreme Court has not addressed the constitutionality of numerous aspects of such alcohol or drug testing programs, and

because the circumstances and manner in which such programs are implemented may affect the determination of the permissibility of any such program,... it is not possible within the scope of an opinion of the Attorney General to provide definitive answers to all of your questions.” Therefore, the Attorney General issued “informal guidance” to the Prosecutor.

It should also be noted that according to the AG’s office, Wayne County “was primarily concerned about its eligibility for the BWC premium reduction program that is tied to drug-free workplace policies.” At the time the opinion was issued, the BWC in Administrative Rule 4123-17-58(E)(4)(a), required “pre-employment /new hire testing at one hundred per cent (drug test required) with testing to be conducted before or within the first ninety days of employment.” This was the context for many of the questions posed by the county.

Again, a copy of the informal guidance letter from the Attorney General is attached for your review as Exhibit 1. We will not attempt to summarize the informal guidance in detail, but we feel it is important for you to carefully review this opinion with counsel if you presently conduct pre-employment drug testing or before you implement any drug testing program.

The primary legal issue involved when implementing a “warrantless or suspicionless” drug testing program is whether the program “violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.” The opinion discusses a variety of case law at both the federal and state level which is way too complex to discuss in this memo. In general, however, it should be noted that a “special needs” test must be applied to determine whether specific positions justify a worker to be drug tested prior to employment.

The informal guidance also quotes an Ohio Supreme Court case that states that “suspicionless testing can be applicable to certain carved-out categories of workers, **but not to all workers**” (emphasis added) (*State ex rel. Ohio AFL-CIO v Ohio Bureau of Workers’ Compensation* 97 OS 3d 504). Counties thus need to take care to assure that the each position where drug testing is required for new hires considers the legal issues discussed in this informal guidance letter.

Moving Forward: Pre-Employment Drug Testing Analysis

The purpose of this section of the document is to give counties guidance in analyzing which county positions can be subject to pre-employment (post offer) suspicionless drug testing. The case law in this area is all quite fact-specific so guidance must be drawn from cases which discuss the process of balancing the county’s interests in having an unimpaired workforce with the individuals’ right to be free from unreasonable search and seizure in the form of a pre-employment drug test. Counties are advised to consult with their Prosecutor in all aspects of developing and implementing an employee drug testing program.

To determine whether pre-employment drug testing of a particular position is lawful, counties must look at the tasks actually to be performed by the newly hired individual. These tasks may be found in the job description, job posting, work rules, and any additional policies and procedures.

Courts have said that public employers may perform suspicionless drug-testing of applicants for employment under the following circumstances:

- When the public employer has a **special need** that outweighs the applicant's privacy interest.

For example: Employees who will have direct and unsupervised contact with prisoners, drug addicted individuals or where a large percent of the population to be served by the employee receives prescription medication.

Employees who are responsible for delivering health care or mental health services to persons in custody or populations with a high frequency of prescription or illicit drug and alcohol use.

- When the employee is in a **heavily regulated industry**, such that the employee has a reduced expectation of privacy.

For example: School teachers and school administrators, corrections workers, licensed water/wastewater treatment workers.

- When the employee is in a **Safety Sensitive Positions**, where the duties involve such risk of injury to self or others that even a momentary lapse of attention could have disastrous consequences. For example, positions which involve:

- Hours of service railroad workers;
- Drug interdiction agents and armed law enforcement agents;
- Firefighters;
- Armed police officers;
- Teachers;
- Bus drivers;
- Certain prison employees;
- CDL holders in accordance with federal regulations.

Courts in other jurisdictions have addressed other occupations that Ohio has not. These positions need to be analyzed on an individualized basis utilizing professional guidance.

- Identification of **Safety Sensitive Positions**, continued:

- Administration of medication / drugs;
- Operation of heavy (construction or industrial manufacturing) machinery;
- Driving vehicles which require a Commercial Drivers License (CDL);
- Providing care and oversight for children, the elderly or others in a protected population;
- Providing safe drinking water – the treatment/distribution of drinking water;
- Transporting individuals (clients, prisoners, etc.) in a vehicle;
- Positions where driving a vehicle is a significant part of the individual's job duties;
- Use of chemicals / substances which could cause physical harm if not handled with the utmost care and attention.

This is not an exhaustive list. Counties are advised to discuss the job duties of a specific position with their Prosecutor to determine whether pre-employment drug testing for a particular position is warranted.

Bureau of Workers Compensation Drug Free Workplace Program

The BWC's Drug Free Workplace Program (DFWP) offers a premium discount to eligible employers that implement a program addressing workplace use and misuse of alcohol and other drugs, including prescription, over-the-counter, and illegal drugs.

Prior to the issuance of the AG's informal guidance to Wayne County, the BWC required 100% of a county's employees to undergo pre-employment or new-hire drug or alcohol testing, regardless of the position the individual was employed to fill.

Since the issuance of the AG's informal guidance, the BWC has changed its DFWP pre-employment drug testing requirement for public employers. To participate in the BWC's DFWP and receive the premium discount, a county is now required to pre-employment drug test 100% of its **safety sensitive** employees. The BWC will accept the determination of the County as to which positions are safety sensitive for the purposes of the DFWP, however, care needs to be taken to be sure the safety sensitive positions meet various tests defined by case law. All other requirements of the DFWP remain the same. Exhibits 3 and 4 are communications from the Bureau of Workers Compensation relating to the DFWP in light of the informal guidance provided to Wayne County (Exhibit 1).

If you have any questions about the materials included in this memo, please contact me or Beth Miller, CORSA Claim and Litigation Manager, at (614) 220-7989 or emiller@ccao.org or Cheryl Subler, Managing Director of Policy, at (614) 220-7980 or csubler@ccao.org.

EXHIBIT 1



STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
MARC DANN, ATTORNEY GENERAL

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May 30, 2007

The Honorable Martin Frantz
Wayne County Prosecuting Attorney
115 West Liberty Street
Wooster, Ohio 44691

Re: 2007OPR003
Drug or Alcohol Testing of County
Employees and Job Applicants

Dear Prosecutor Frantz:

You have requested an opinion concerning the institution of drug/alcohol testing by various county appointing authorities of their employees. Your specific questions are as follows:

1. Can county level public entities conduct suspicionless pre-employment drug/and or alcohol testing as a condition of employment?
2. If pre-employment drug testing is permissible under R.C. [Chapter 124], can it be sought from employees who will not be employed in "safety sensitive" positions?
3. Based upon current Ohio case law, which positions are currently regarded as safety sensitive?
4. Where drug testing is conducted for other than diagnostic reasons (such as pre-employment testing), are the results a "public record" under R.C. 149.43, as interpreted in *State ex rel. Multimedia v. Snowden*, 72 Ohio St. 3d 141?
5. Is a "report" of drug or alcohol use by a public employee to be considered a "public record," if it is committed to writing or e-mail (as where one employee reports alleged drug abuse by another employee?)
6. Can a county public employer ever conduct "suspicionless" testing of employees in non-safety sensitive positions? If so, under what circumstances?

7. As for post-accident testing, is reasonable suspicion met where there is merely speculation that a worker “may” have caused or contributed to an on the job accident?
8. Under R.C. [Chapter 4117], could a public employee union, by collective bargaining agreement, waive the due process rights of bargaining unit employees; and agree to random drug testing for non-safety sensitive positions?

As you indicated in your opinion request, there are numerous United States Supreme Court cases, as well as cases decided in varying ways by different United States Circuit Courts, that have addressed different aspects of governmental actors conducting drug or alcohol testing of individuals, including employees. In addition, there are a variety of Ohio Supreme Court cases that must also be considered when addressing various aspects of governmental entities conducting such tests, whether pre-employment or during employment. Because the United States Supreme Court has not addressed the constitutionality of numerous aspects of such alcohol or drug testing programs, and because the circumstances and manner in which such programs are implemented may affect the determination of the permissibility of any such program, *see generally, e.g., Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), it is not possible within the scope of an opinion of the Attorney General to provide definitive answers to all of your questions. Consequently, we are providing you the following informal guidance.

You have informed us that your concerns about the county’s possible implementation of a drug-testing program for current and potential county employees arises from the county commissioners’ desire to qualify for lower premium rates from the Bureau of Workers’ Compensation (BWC) through participation in the Bureau’s drug-free workplace discount program (DFWP), 10A Ohio Admin. Code 4123-17-58. Because it appears that county appointing authorities do not have authority to comply with the requirements for the county’s participation in the Bureau’s DFWP, it is not necessary to address each of the concerns presented by your specific questions.

We begin with a brief discussion of the manner in which a county participates in the workers’ compensation program.¹ In accordance with R.C. 4123.38, each public employer,

¹ The state’s workers’ compensation scheme was enacted pursuant to Ohio Const. art. II, § 35, which states, in part:

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen’s employment, laws may be passed establishing a state fund to

including a county, has a duty to contribute to the public insurance fund an amount determined by the Administrator of Workers' Compensation under R.C. 4123.39, which states, in pertinent part:

The administrator of workers' compensation shall determine the amount of money to be contributed under [R.C. 4123.38] by the state itself and each county and each taxing district within each county. In fixing the amount of contribution to be made by the county, for such county and for the taxing districts therein, the administrator shall classify counties and other taxing districts into such groups as will equitably determine the contributions in accordance with the relative degree of hazard, and also merit rate such individual counties, taxing districts, or groups of taxing districts in accordance with their individual accident experience so as ultimately to provide for each taxing subdivision contributing an amount sufficient to meet its individual obligations and to maintain a solvent public insurance fund.

The BWC offers various methods for employers to reduce the amount of their BWC premiums. Your concern is with the Drug-Free Workplace Policy, which is "the bureau's rate program which offers a premium discount to eligible employers for implementing a program addressing workplace use and abuse of alcohol and other drugs, including prescription, over-the-counter, and illegal drug abuse." Rule 4123-17-58(A)(1). *See generally* rule 4123-17-58 (stating, in part, "[p]ursuant to [R.C. 4123.34(E)], the administrator may grant a discount on premium rates to an eligible employer that meets the drug-free workplace (DFWP) program requirements under the provisions of this rule").

In order to participate in the Bureau's DFWP, an employer must meet various eligibility requirements and implement a policy that includes all the components prescribed by rule 4123-17-58, in part, as follows:

(C) Eligibility Requirements.

The DFWP program under this rule is available in the form of technical assistance and support to all private and public employers. However, *eligibility*

be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

for the discount is limited to state fund employers,² with the per cent of discount based on an employer's participation in one or more alternate rating programs. . . .

....
(E) Program requirements – all program levels.

To receive a discount for implementing and operating a DFWP program, *an employer shall fully implement, at a minimum, the following program components* by the applicable dates.

....
(4) Drug and alcohol testing – The DFWP program shall include drug and alcohol testing which, at a minimum, shall consist of a five-panel drug screen with gas chromatography/mass spectrometry (GC/MS) and alcohol testing consistent with federal standards. The employer shall implement and pay for drug and alcohol testing as follows, with the stipulation that all categories of testing shall be clearly described and defined in the employer's written policy.

(a) *Pre-employment/new-hire testing: at one hundred per cent* (drug test required), with testing to be conducted before or within the first ninety days of employment;

(b) *Post-accident: All employees who may have caused or contributed to an on-the-job accident,³ as defined in paragraph (A)(3) of this rule, shall submit*

² In accordance with R.C. 4123.30, the state insurance fund is divided into the “public fund,” into which contributions from public employers are placed, and the “private fund.” Self-insuring employers are not state fund employers. *See generally* R.C. 4123.25 (in part, explaining obligations of self-insuring employers).

³ 10A Ohio Admin. Code 4123-16-58(A) states, in pertinent part:

(3) “Accident” means an unplanned, unexpected, or unintended event which occurs on the employer's property, during the conduct of the employer's business, or during working hours, or which involves employer-supplied motor vehicles or motor vehicles used in conducting the employer's business, or within the scope of employment, and which results in any of the following:

(a) A fatality of anyone involved in the accident;

(b) Bodily injury requiring off-site medical attention away from the employer's place of employment;

(c) Vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy; or

(d) Non-vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy.

As used in this rule, “accident” does not have the same meaning as provided in [R.C. 4123.01(C)], and the definition of this rule is not intended to

to a drug or alcohol test. This test will be administered as soon as possible after necessary medical attention is received, or within eight hours for alcohol and within thirty-two hours for other drugs. (Emphasis and footnote added.)

Thus, in order for a county, as an employer, to be eligible to participate at any level of discount in the BWC's DFWP, the county must, among other things, conduct pre-employment or new-hire drug testing of *all* county employees, regardless of the nature of the position for which the individual is employed. See generally rule 4123-17-58(H) (stating, in part, "[t]he bureau may cancel an employer's participation in the DFWP program for the employer's failure to fully implement a DFWP program in compliance with the approved program level"). It is the requirement established by rule 4123-17-58(E)(4)(a) that presents the most immediately apparent barrier to participation in BWC's DFWP by public employers.

As you mentioned in your opinion request, the United States Supreme Court and other federal courts, as well as the Ohio Supreme Court, have addressed issues presented when governmental entities, or those acting as agents of a governmental entities, conduct warrantless drug and alcohol tests that require taking blood, breath, or urine of private persons.

For example, in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, 780 N.E.2d 981 (2002), the Ohio Supreme Court concluded in the syllabus that: "2000 Am. Sub. H.B. No. 122, which permits the *warrantless* drug and alcohol testing of injured workers *without any individualized suspicion* of drug or alcohol use, violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution." (Emphasis added.)

At issue in the *AFL-CIO* case was the constitutionality of 1999-2000 Ohio Laws, Part I, 749 (Am. Sub. H.B. 122, eff. April 10, 2001), which amended R.C. 4123.54 to establish, for purposes of the workers' compensation system, "a rebuttable presumption that the proximate cause of an injury of an employee, who, through a blood, breath, or urine test, tests positive for the use of alcohol or a controlled substance not prescribed by a physician, is the alcohol or controlled substance." Am. Sub. H.B. 122. At the time, if a worker's use of alcohol or drugs was the proximate cause of the worker's injury, the worker was not entitled to receive workers' compensation benefits for that injury. Am. Sub. H.B. 122 allowed for breath, blood, or urine testing of employees following a workplace injury. If the testing revealed the presence of a prohibited level of alcohol or a controlled substance in the worker's body, a rebuttable presumption was created that the proximate cause of the worker's injury was the influence of the alcohol or controlled substance. The same rebuttable presumption was created for any worker who refused to submit to such testing. As summarized by the *AFL-CIO* court at ¶ 7: "under

modify the definition of a compensable injury under the workers' compensation law.

[Am. Sub.] H.B. 122, every Ohio worker injured on the job must submit to an employer-requested chemical test, regardless of whether the employer has any reason to believe that the injury was caused by the employee's intoxication or use of controlled substances."

In analyzing the question whether Am. Sub. H.B. 122 violated workers' rights to be free from unreasonable governmental searches and seizures, the *AFL-CIO* court first determined that the state's entanglement with employers, both public and private, in the workers' compensation system was so great that the action of private employers in requiring the drug and alcohol testing mandated by R.C. 4123.54 constituted state action for purposes of fourth-amendment analysis.⁴

The *AFL-CIO* court then determined that the drug and alcohol tests required by R.C. 4123.54 were "searches" for purposes of the fourth amendment to the United States Constitution. In considering whether these searches violated the constitutional rights of the individuals tested to be free from unreasonable searches and seizures, the *AFL-CIO* court, at ¶¶ 24-28, utilized the following analysis:

In general, the reasonableness of a particular search or practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402, 103 L.Ed.2d 639, quoting *Delaware v. Prouse* (1979), 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660. What we commonly think of as a necessary element of a reasonable search, a warrant based upon probable cause, is not a prerequisite to every search. The Supreme Court has held that "[a] search unsupported by probable cause can be constitutional * * * 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Vernonia School Dist. 47J v. Acton* (1995), 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564, quoting *Griffin v. Wisconsin* (1987), 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709.

⁴ As explained by the court in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, 780 N.E.2d 981 (2002), at ¶¶ 18-19:

[R.C. 4123.54] sets forth the consequences for the employees' refusal to take an employer-requested test. Without this legislation, an employer could not withhold an employee's workers' compensation for failure to take a drug test. The rebuttable presumption created by the state is the hammer that forces an employee to take an employer-directed drug test. It is a complete entanglement of private and state action.

We therefore find that the state of Ohio's significant promotion of drug testing through its exercise of coercive power creates the close nexus between the state and the challenged action required to constitute state action.

Thus, as long as the government interest behind the drug testing is not merely to fight crime, i.e., when the results of testing are not used to procure criminal convictions, governmental special needs can be enough to obviate the general requirement of probable cause or individualized suspicion of wrongdoing:

“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.” *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402, 103 L.Ed.2d 639.

The “special needs” analysis includes a consideration of the practicalities of achieving the government’s objectives through the ordinary means of securing a warrant based on probable cause. If securing a warrant is impracticable, then the government’s special needs are weighed against the individual’s privacy interest:

“Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” *Chandler v. Miller* (1997), 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513.

Based upon a review of seminal United States Supreme Court cases addressing government-required suspicionless and warrantless drug testing of individuals, the *AFL-CIO* court described three categories of constitutionally permissible suspicionless searches: 1) the tested individuals have a demonstrated history of drug abuse, *see, e.g., Skinner v. Ry. Labor Executives’ Assn.*, 489 U.S. 602 (1989) (railroad employees) and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (student athletes); 2) the tested individuals hold unique positions in which safety issues are critical, *see, e.g., Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs positions that involve drug interdiction or enforcement of related laws, the carrying of firearms, or the handling of classified materials); 3) the tested individuals hold positions in which the use of drugs would cause a serious danger to workers or co-workers or to the general public, *see, e.g., Von Raab, Skinner*. As concluded by the *AFL-CIO* court, at ¶ 46, “[s]uspicionless testing can be applicable to certain carved-out categories of workers, but not to all workers.”

As characterized by the *AFL-CIO* court, Am. Sub. H.B. 122’s drug and alcohol testing requirement was not targeted at any specific group or groups of employees who fit within any of the three categories of individuals for whom the government’s demonstrated special needs outweighed the individuals’ constitutional rights to be free of unreasonable government searches and seizures. Moreover, the *AFL-CIO* court stated at ¶ 47: “Even if there were special needs successfully asserted by the state, the expectation of privacy of Ohio’s workers would outweigh

them.” As a final matter, the *AFL-CIO* court determined that the drug testing requirements of Am. Sub. H.B. 122 also violated “the Ohio Constitution, which prohibits unreasonable searches and also contains special considerations⁵ for Ohio’s workers.” 97 Ohio St. 3d 504, ¶ 53 (footnote added).

Although the *AFL-CIO* case does not directly address the constitutionality of a public employer’s implementation of BWC’s DFWP, as described in rule 4123-17-58, its conclusions indicate that a BWC program that requires 100% of a county’s employees to undergo pre-employment or new-hire drug or alcohol testing, regardless of the position the individual was employed to fill, does not pass the “special needs” test articulated in the *AFL-CIO* case. Such a requirement is similar to the policy addressed in the *AFL-CIO* case in that it does not target a specific group of positions to be filled for which the government’s “special needs” require such testing. In the absence of a showing that county employees’ individual expectation of privacy is outweighed by a demonstrated special need of the government, a county’s implementation of the drug and alcohol testing required by rule 4123-17-58(E)(4)(a) as a prerequisite to county employment would appear to violate the rights of the individuals tested, under both the United States and Ohio constitutions, to be free from unreasonable searches and seizures. Because an employer that does not comply with, among other things, rule 4123-17-58(E)(4)(a), is not eligible to participate in any level of the BWC’s DFWP, it does not appear that a county may become eligible to participate in the DFWP.

I trust that the foregoing discussion of a county’s inability to qualify for participation in the Bureau of Workers’ Compensation’s DFWP addresses the primary concern of the county

⁵ Citing *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St. 2d 608, 614, 433 N.E.2d 572 (1982), the *AFL-CIO* court explained the philosophy behind Ohio’s workers’ compensation system, as follows:

“The workers’ compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers’ Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability.”

97 Ohio St. 3d 504, at ¶ 50. The *AFL-CIO* court also noted that workers in Ohio “have the expectation that Section 34, Article II of the Ohio Constitution would also protect them from baseless searches.” *Id.* at ¶ 51. See generally Ohio Const. art. II, § 34 (stating, in part, “[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees”).

The Honorable Martin Frantz
May 30, 2007
Re: Opinion Request 2007OPR003

- 9 -

commissioners, *i.e.*, whether they may participate in the DFWP. Should you have additional concerns, please do not hesitate to contact me.

Respectfully,



Mary Lynne Okano
Assistant Attorney General
Opinions Section

cc: Kevin McIver, Chief
Opinions Section

EXHIBIT 2

OHIO ATTORNEY GENERAL'S OFFICE, OPINIONS SECTION LETTER CONCERNING THE INFORMAL OPINION ISSUED TO THE WAYNE COUNTY PROSECUTOR

Thank you for your inquiry.

The Opinions Section of the Attorney General's office provided **informal** advice in May 2007 to the prosecuting attorney of Wayne County in response to a lengthy series of questions he presented on the general subject of pre-employment and post-employment drug testing of county employees. When we contacted the prosecutor for additional information on his questions, however, he told us that county government was primarily concerned about its eligibility for the BWC premium reduction program that is tied to drug-free workplace policies. This is noted on page 2 of our letter to the prosecuting attorney.

As we further explained in our letter, in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers Comp.* 97 Ohio St. 3d 504 (2002), the Ohio Supreme Court found the drug testing provisions of that BWC program unconstitutional insofar as the pertinent legislation (1999-2000 Ohio Laws, Part I, 749 (Am. Sub. H.B. 122, eff. April 10, 2001) authorized warrantless testing of *all* employees without any individualized suspicion of drug or alcohol use. In light of that finding, there was no point in us addressing all the subsidiary questions that the prosecuting attorney had presented.

The informal opinion itself does not prohibit anything, however. How the City of (REDACTED) chooses to proceed, based upon its legal counsel's independent analysis of the issue, is a matter only the city can determine for itself. The same applies to all other Ohio political subdivisions.

From what we have heard so far on this matter since we sent our letter to the prosecuting attorney, this informal advice has not been well understood by many parties. The scope of its advice has been mischaracterized and overstated as well. The letter's analysis is, in fact, limited to a very specific, discrete issue. I urge you to read the letter carefully, and consult with your legal counsel, the city law director, for further guidance.

The informal advisory letter, which was prepared by an attorney within the Opinions Section, is attached here for your reference.

EXHIBIT 3

Ohio Bureau of Workers' Compensation
30 W. Spring St.
Columbus, OH 43215-2256



Ted Strickland
Governor
ohioabc.com

Marsha P. Ryan
Administrator/CEO
1-800-OHIOBWC

Public Employers (PECs) and Drug Testing to Meet Drug-Free Workplace Program Requirements June 2007

BWC is aware of an informal opinion of the Ohio Attorney General (OAG) related to public employer taxing districts (PECs) participating or seeking to participate in a BWC drug-free workplace program. One of the program requirements is that participating employers conduct pre-employment and/or new hire drug testing for 100% of job applicants. This requirement does not distinguish between private employers and public employers.

Based on the AG opinion, the county that requested the opinion believed that it could not participate in a BWC drug-free workplace program because the opinion indicates that county agencies cannot legally drug test 100% of applicants for employment (pre-employment testing) or test employees within an established period of time (90 days) from time of hire (new-hire testing). The AG opinion appears to permit, however, drug testing for safety-sensitive positions, and it is possible that counties could justify other positions for testing based on such issues as driving county vehicles or fiduciary responsibilities. Thus, public employers may require a candidate for a safety-sensitive job or other positions for which justification can be produced to submit to a drug test as a condition of employment or for retention of employment if new-hire testing were involved.

At issue is whether any public employer could meet the program's 100% testing requirement. **Until further notice, public employers that participate in a BWC drug-free workplace program (DFWP or Drug-Free EZ) will not be required to perform 100% pre-employment drug testing for other than employees whom the employer determines to be safety sensitive.** Public employers should consult with their legal counsel before testing other than safety-sensitive employees, but BWC will not consider a public employer to be non-compliant with program requirements for failure to require 100% pre-employment drug testing.

BWC defines safety sensitive position or function in rule 4123-17-58 (the DFWP Rule) and rule 4123-17-58.1 (the Drug-Free EZ Program Rule) as applying to "any job position or work-related function or job task designated as such by the employer, which through the nature of the activity could be detrimental or dangerous to the physical well-being of the employee, co-workers, customers or the general public through a lapse in attention or judgment. The safety-sensitive position or function may include positions or functions where national security or the security of employees, co-workers, customers, or the general public may be seriously jeopardized or compromised through a lapse in attention or judgment." Thus, the employer - which shoulders the risk - is allowed to use this definition to determine which positions should be considered "safety sensitive."

This same definition, used previously to identify which positions were subject to random drug testing for Level 2 and Level 3, can be applied to which applicants are drug tested to comply with the 100% testing of safety sensitive employees to be considered as being in compliance. A public employer that ensures 100% pre-employment and/or new hire testing of its safety-sensitive employees will be considered in compliance with BWC drug-free requirements.

BWC will keep public employers posted with additional information when it becomes available. Until then, employers participating in DFWP or DF-EZ must continue to do pre-employment and/or new hire testing of safety-sensitive positions to be considered compliant.

EXHIBIT 4

Ohio Bureau of Workers' Compensation
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Governor
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Marsha P. Ryan
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July 13, 2007

Policy No: 30000623

Re: Pre-Employment and/or New-Hire Drug Testing to Meet Drug-Free Workplace Program Requirements

Dear Public Employer:

The Ohio Bureau of Workers' Compensation (BWC) is providing all public employers with an important update on its drug-free workplace programs (DFWP and Drug Free-EZ). As you are aware, one aspect of the DFWP is pre-employment or new-hire testing. Previously, BWC required employers participating in the program to test all employees either during the pre-employment or new-hire period in order to successfully fulfill that component.

However, an informal opinion from the Ohio Attorney General's office, dated May 30, 2007, alters those guidelines for public employers. As a result, BWC will no longer require public employers to conduct pre-employment (post offer) and/or new-hire (probationary period) testing for every applicant who is applying for or filling positions. Instead, DFWP only requires public employers to administer pre-employment or new-hire testing for those positions determined to be "safety sensitive." Public employers that meet all other DFWP requirements will be considered compliant if they apply pre-employment and/or new-hire drug testing to, at minimum, 100 percent of applicants for safety-sensitive positions.

BWC defines a "safety-sensitive position or function" as "any job position or work-related function or job task designated as such by the employer, which through the nature of the activity could be detrimental or dangerous to the physical well-being of the employee, co-workers, customers or the general public through a lapse in attention or judgment. A safety-sensitive position or function may include positions or functions where national security or the security of employees, co-workers, customers, or the general public may be seriously jeopardized or compromised through a lapse in attention or judgment." See Ohio Administrative Code 4123-17-58 (DFWP) and 4123-17-58.1 (Drug-Free EZ). This is the same definition that public employers participating in Levels 2 or 3 of the DFWP used to identify positions subject to random drug testing.

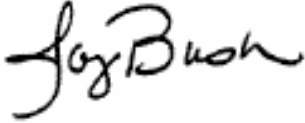
Please note that BWC's program requirements for pre-employment or new-hire testing are only minimum requirements. While BWC no longer requires universal pre-employment and/or new-hire testing, a public employer that chooses to test more expansively on a "special needs" basis would not appear to violate the Attorney General's informal opinion. However, public employers are advised to assess their individual situations and consult with their own legal counsel to help determine any additional "special needs" categories that should be included in pre-employment and/or new-hire drug testing.

To fulfill the intent of DFWP and Drug Free-EZ, please remember all other program requirements must be met in order for the programs to succeed and reduce the chances of your organization having a

(over)

workplace accident resulting from substance use or abuse. If you have additional questions on these changes, please e-mail BWC at dfwp@ohiobwc.com or call (614) 466-6773. BWC appreciates your ongoing commitment to keeping Ohio's workers safe and healthy and looks forward to its continued partnership with you.

My best regards,

A handwritten signature in black ink that reads "Joy Bush". The signature is written in a cursive, flowing style.

Joy Bush
Executive Director, Employer Management Services
The Ohio Bureau of Workers' Compensation