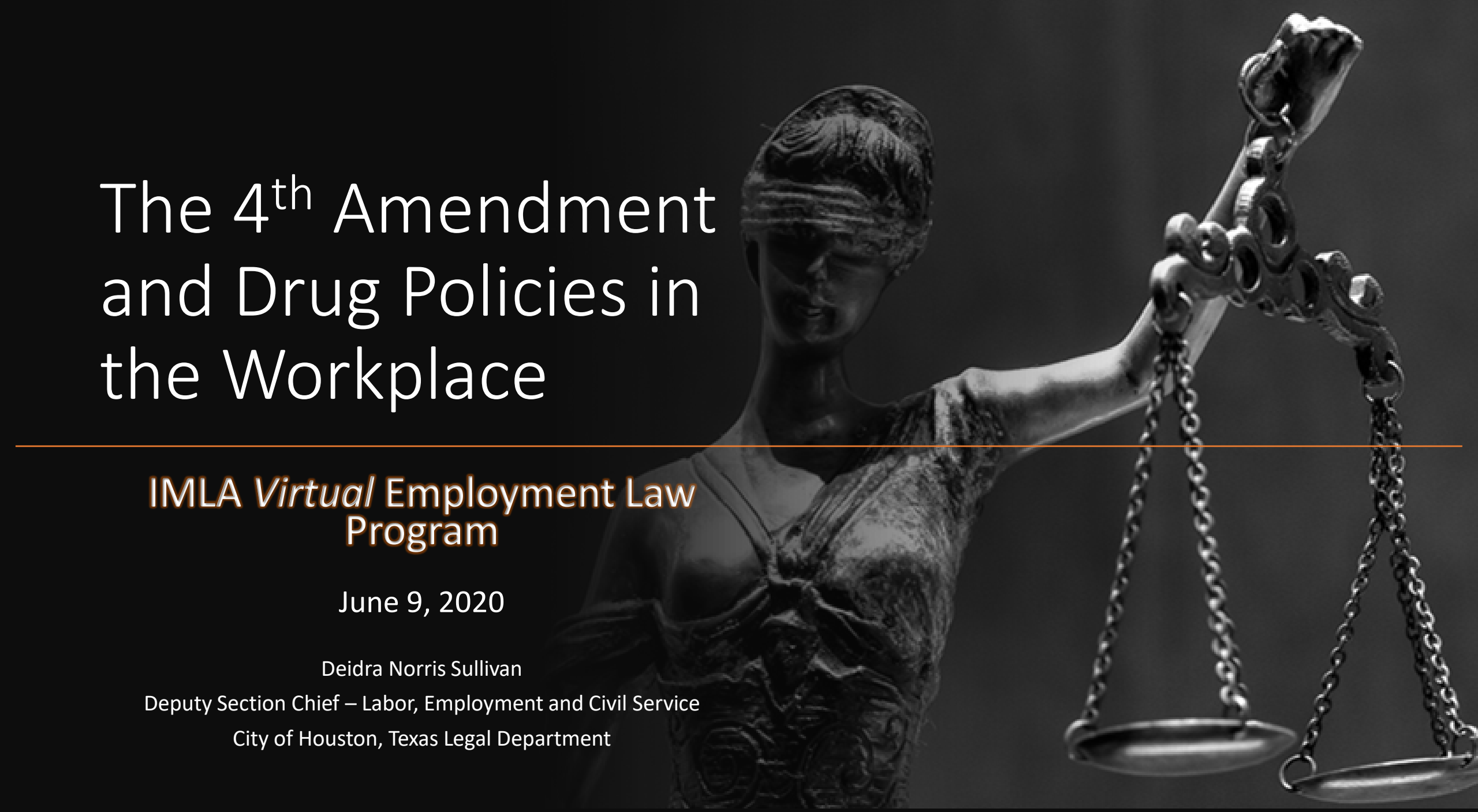
The 4th Amendment and Drug Policies in the Workplace



IMLA *Virtual* Employment Law Program

June 9, 2020

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AGENDA

- Background
- Basis for Testing
  - Pre-employment
  - Reasonable Suspicion
  - Post-Accident
  - Random
- Other Considerations
- Questions



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Background

- Drug and alcohol testing in the workplace is a **search** within the meaning of the **Fourth Amendment**.
- "In light of our society's concern for the **security of one's person**, it is obvious that this **physical intrusion**, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing **chemical analysis** of the sample to obtain physiological data is a further **invasion of** the tested employee's **privacy interests**." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)
- Subjecting a person to a **breathalyzer test**, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, s implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber,* should also be deemed a search. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)

Background (continued)

"We have recognized before that requiring the Government to procure a warrant for every work-related intrusion 'would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter.' " Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666, 109 S. Ct. 1384, 1391, 103 L. Ed. 2d 685 (1989)(citing O'Connor v. Ortega, *supra,* 480 U.S., at 722, 107 S.Ct., at 1500; quoting Connick v. Myers, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983)).

Background (continued)

What do we know about 4th Amendment searches?

- Must be reasonable
- Must be based on individualized suspicion of wrongdoing



Drug/alcohol testing in the workplace

- There is no crime detection concern
- Balancing competing private and public interests



Basis for Testing

- Pre-Employment
- Pre-Assignment
- Random
- Post-Accident
- Reasonable suspicion
- Return to duty





PRE-EMPLOYMENT

BASIS FOR TESTING

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PRE-EMPLOYMENT TESTING

Definition and Overview



- Testing administered to applicants as part of the on-boarding process.
- The purpose of this testing is to address illegal drug use in the workforce by pre-screening applicants. There is a correlation between drug use and poor performance, high absenteeism, accidents – all which results in the waste of taxpayer's money and potential exposure to liability*.
- The Supreme Court and lower courts compare the use of pre-employment drug testing to pre-employment medical examinations.

* 1 Drug Testing Law Tech. & Pract. §2:27

PRE-EMPLOYMENT TESTING

Legal Issues





"It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens." Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987)

PRE-EMPLOYMENT TESTING

Best Practices



- Provide notice in job postings that passing the drug test is a condition of employment.
- Even if the employee begins employment before the drug test results are received, provide in writing that continued employment is conditioned on successful passing of a drug test. Include a signed acknowledgment of the condition.

REASONABALE SUSPICION TESTING

BASIS FOR TESTING



REASONABLE SUSPICION TESTING

Definition and Overview



- There is not one national standard of defining “reasonable suspicion”.*
- Generally, reasonable suspicion “exists when an employer has specific, objective facts, and reasonable inferences drawn from those facts, that suggest an employee is using drugs while on the job.*

* 1Drug Testing Law Tech. & Prac. § 2:29

REASONABLE SUSPICION TESTING

Definition and Overview



- Some states establish the parameters for drug testing in the workplace, including defining “reasonable suspicion”.
  - **Minnesota:** "Reasonable suspicion" means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.
  - **Utah**: An employer may require the collection and testing of samples for the following purposes…investigation of possible individual employee impairment.
  - **Alabama and Florida:** “Reasonable-suspicion drug testing” means drug testing based on a belief that an employee is using or has used drugs in violation of the employer’s policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. (see specific description on next slide)

REASONABLE SUSPICION TESTING

Definition and Overview (cont.)



1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
3. A report of drug use, provided by a reliable and credible source.
4. Evidence that an individual has tampered with a drug test during his or her employment with the current employer.
5. Information that an employee has caused, contributed to, or been involved in an accident while at work.
6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

REASONABLE SUSPICION TESTING

Legal issues



- Delays in reporting conduct observed while at work.
- Credibility of 3rd parties reporting substance/alcohol abuse. Some courts have upheld reasonable suspicion determinations in cases where the reporting 3rd party has a close personal relationship with the employee and reported personal observation.
- Does reasonable suspicion require more than one of the listed examples or will one example suffice? (e.g. smell of alcohol vs. attendance issues)

REASONABLE SUSPICION TESTING

Best practices



- Clearly define conduct which would establish reasonable suspicion and require written documentation of the conduct which established reasonable suspicion.
- Because this basis of testing involves/implies discretion, consider requiring authorization from senior management, human resources, or another designated person who has been trained on the topic.
- Institute regular training for supervisors and those newly promoted into supervisory roles.



POST-ACCIDENT TESTING

BASIS FOR TESTING

POST-ACCIDENT TESTING

Definition and Overview



Drug and alcohol testing that is triggered by an event specifically defined in an employer's policy. This could be a motor vehicle accident or an accident in the workplace that results in an injury or property damage.

POST-ACCIDENT TESTING

Legal Issues



- Narrowly tailoring the parameters of post-accident drug and alcohol testing.
- Property damage valuations are not necessarily determinative of the constitutionality of post-accident drug and alcohol testing.
- A determination of fault is also not necessarily determinative of the constitutionality of post-accident drug and alcohol testing.

POST-ACCIDENT TESTING

Best Practices



- Define what is considered an accident for purposes of an employee being subjected to post-accident testing.
- For certain minor accidents/incidents, consider requiring observations equated with reasonable suspicion or for cause drug and alcohol testing.



RANDOM

BASIS FOR TESTING

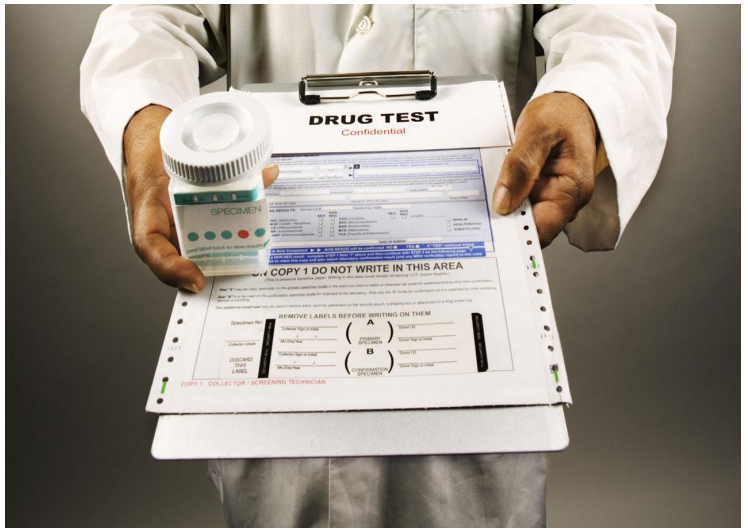
RANDOM TESTING



Definition and Overview

- Certain employees are subject to controlled substance testing at random times. Unlike the other basis for testing, there is no suspicion of drug use or impairment by the employee or any triggering event and without prior notice to the employee.
- Employees have been most successful at challenging the constitutionality of random testing.
- Success against a challenge regarding random testing is going to turn heavily on the balance of government interest and the employee's privacy; courts also consider the nature of the job duties of the public employee.

RANDOM TESTING

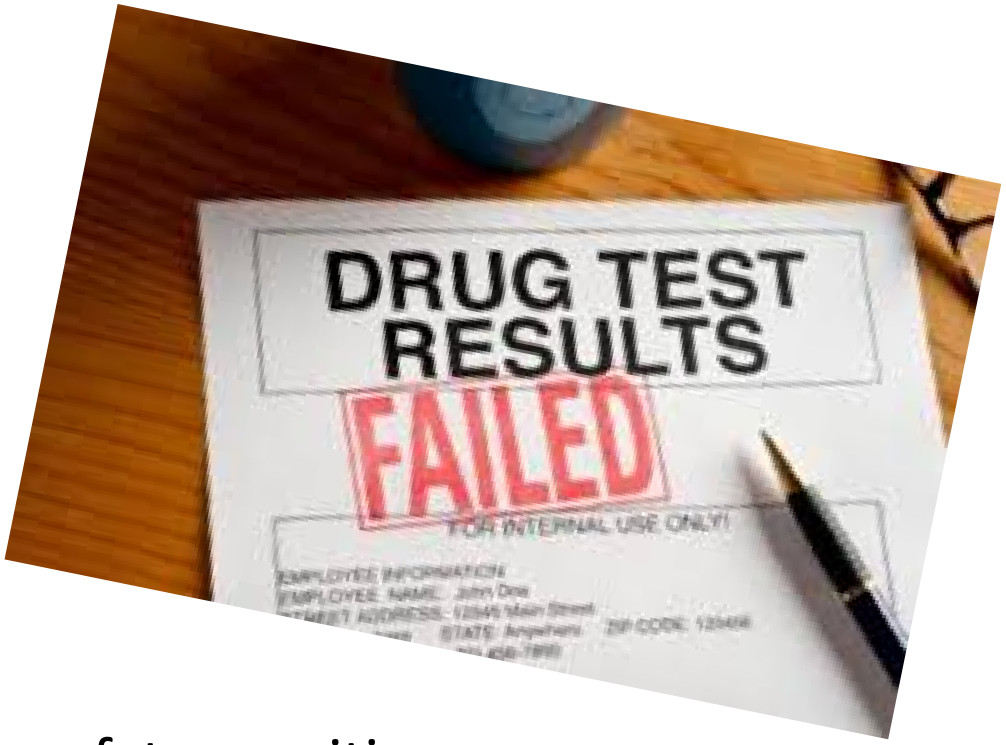


Legal Issues

- What makes a job safety or security sensitive?
- **Connecticut (Conn. Agencies Regs. § 31-51x-1)**: High-risk or safety sensitive occupations are defined by the regulations as those that:
  - (1) inherently involve a significant life-threatening danger to the employee, fellow employees, or the general public;
  - (2) require the use of judgment or a high degree of care or caution; and
  - (3) are such that the employer could not evaluate the employee's performance by personal observation.

RANDOM TESTING

Best Practices



- Regularly review position designated as safety-sensitive.
- Provide notice that the position is designated safety-sensitive.
  - Job Posting – Internal and External
  - Post-review – provide written notice to effected employees.
- Ensure that the pool is random and that the selection of names for testing is consistent with accomplishing the goal of public safety or drug deterrence.



OTHER CONSIDERATIONS

OTHER CONSIDERATIONS



1. Notice (e.g. how often, how, when, etc.)
2. Consider testing authorizations and approvals for employees who work shifts outside “normal” business hours (e.g. 24-hour shifts, nights, weekends, etc.)
3. Drug panel
4. Addressing the legal use of controlled substances and consumption of alcohol for employees performing safety-sensitive duties.
5. Confidentiality and requests for disclosure of results to third parties.

OTHER CONSIDERATIONS (continued)



Legal Use of Controlled Substances and Alcohol and Its Impact in the Workplace

- Policies should address requirements and the process for handling employees who can be called in to work. (i.e. duty to disclose, duty to refrain, etc.)
- ADA considerations for employees who perform safety-sensitive duties and are medically required to take controlled substances during the workday which have side-effects that would negatively impact the performance of safety-sensitive job duties.
- Improper use of legally-prescribed controlled substances.

OTHER CONSIDERATIONS (continued)



Legal Use of Controlled Substances and Alcohol and Its Impact in the Workplace (cont.)

If not a zero-tolerance workplace, for purposes of discipline:

- Will the policy distinguish between an employee who is working under the influence of a legal drug vs. an illegal drug?
- Will the policy distinguish between an employee working under the influence of alcohol vs. controlled substance?

OTHER CONSIDERATIONS (continued)



Confidentiality and Requests for Disclosure

- Identify who will receive the results (e.g. supervisors, MRO, legal counsel, hearing officers/arbitrators); consider subpoenas for non-work-related proceedings
- The courts consider the fact that the results of the drug/alcohol tests are only being used for employment reasons, kept by the employer and is not being used for criminal or other licensing reasons.
- If State licensing of the municipality or the employee (in order to perform the duties for which the employee is hired) requires disclosure, include language in the consent that would provide notice.

OTHER CONSIDERATIONS (continued)



Confidentiality and Requests for Disclosure (cont.)

Example:

I understand that only duly-authorized Company officers, employees, and agents will have access to information furnished or obtained in connection with the test; that they will maintain and protect the confidentiality of such information to the greatest extent possible; and that they will share such information only to the extent necessary to make employment decisions and to respond to inquiries or notices from government entities.

https://www.twc.texas.gov/news/efte/drug_and_or_alcohol_testing_consent_form.html


Any
Questions



Resources

- 1 L. Camille Hébert, Employee Privacy Law (June 2020)
- 1 David Evans, Drug Testing Law Tech. & Prac. (Mar. 2020)
- https://www.aclu.org/other/state-state-workplace-drug-testing-laws