The State of South Carolina

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The Honorable Joe Wilson
Senator, District No. 23
Suite 606, Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator Wilson:

As you are aware, your letter dated January 19, 1989, to Attorney General Medlock has been referred to me for response. By that letter, you inquired: "Please advise me if South Carolina needs a statute to authorize random drug-testing by employers."

Of course, the South Carolina General Assembly is constitutionally designated with the legislative power of this State. S.C. Const. art. III, §1. The policy determination as to the necessity of a specific statute lies, therefore, ultimately with the South Carolina General Assembly. See S.C. Const. art. I, §8. Random drug testing by employers, with or without an enabling statute, raises various legal issues. The express language of such a statute would determine the success of a legal challenge to that particular statute.

Drug testing in the workplace has become perhaps one of the most controversial facets of the current war against drugs. See, e.g., Drug Testing Symposium Foreword, 14 Wm. Mitchell L. Rev. 231-42, 232 (1988)("Testing is clearly one of the hottest topics in employment law today."); Bible, Employee Urine Testing and Federal Appeals Courts, 26 Am. Bus. L. J. 219-54, 219 (1988) ("Whether employers may resort to compulsory urinalysis to find evidence of workplace-related drug use is one of the most hotly debated legal issues of the 1980's."). Cf. S.C. Att'y Gen. Op. #87-85 (Oct. 15, 1987)(analyzing the constitutionality of mandatory AIDS testing).

In defending against challenges to drug testing, "[e]mployers generally argue that they want to make their workplaces productive and safe." Kaplan, Langevin, & Ross, Drug and Alcohol Testing in the Workplace: The Employers' Perspective, 14 Wm. Mitchell L. Rev. 365 - 92, 365 (1988). In addition, employers argue that drug testing helps satisfy two legal responsibilities imposed upon employers. First,

> [a]t common law, an employer has legal responsibilities for the protection of its employees. An employer's common law responsibilities include the following duties: (1) to provide a safe work environment; (2) to provide safe appliances, tools and equipment; (3) to warn of dangers of which employees might reasonably be expected to remain in ignorance; (4) to provide an adequate number of suitable fellow employees; and (5) to promulgate and enforce rules for employee conduct which will enhance work safety. Based on common law, therefore, employers have a strong argument that drug testing enables them to protect the health, safety and morale of all employees by early detection of drug abuse problems and the prevention of drug-related accidents. . . . [Footnote omitted.]

Id. at 369. Second, "[i]n addition to the legal duty to provide a safe workplace, employers can be held liable for negligent hiring or retaining employees who prove to be dangerous workers." Id. at 370.

> Employers generally point to four factors as justification for substance screening. First, employers contend that substance use has a direct economic impact on business, largely attributable to lost productivity. Second, employers fear liability may attach because of traditional employer responsibility for the acts of employees. Third, employers fear losses attributable to employee theft and disclosure of business secrets. Finally, employers assert that conduct by employees during off-work hours impacts their on-the-job fitness. The theme underlying these factors is an employer's desire to run a business more profitably by eliminating, or reducing, costs associated with labor. [Footnote omitted.]

Note, To Test or Not to Test: Is that the Question? Urinalysis Substance Screening of At Will Employees, 14 Wm. Mitchell L. Rev. 393-442, 399-400 (1988).

Because your letter does not contain a copy of such proposed legislation, a definitive response to your question is not possible. Your letter also does not specify whether such random drug testing would be mandatory or voluntary or would occur in the public or private sector of employment. Nevertheless, drug testing, in general, raises several legal issues, including potential constitutional challenges.

One legal periodical has stated that drug testing "raise[s] issues regarding invasion of privacy, relevance to effective performance, risk of undue disclosure of results, and deterrence of participation in rehabilitation programs." Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 Employee Rel. L. J. 422 (1986).

Random drug testing may be challenged upon grounds that the employee's constitutional rights pursuant to the fourth amendment of the United States Constitution have been violated. See U.S. Const. amend. IV. Cf. S.C. Const. art. I, §10 ("Searches and seizures; invasion of privacy."). According to one legal periodical,

> [t]he fourth amendment is enforceable against the various states through the fourteenth amendment but prohibits only searches and seizures which are unreasonable. A search is reasonable, if at its inception, there are reasonable grounds to show that the proposed search will uncover evidence (work-related drug use), and if the means adopted is reasonably related to the objective of the search and not excessively intrusive. [Footnotes omitted.]

Ayers, Constitutional Issues Implicated by Public Employee Drug Testing, 14 Wm. Mitchell L. Rev. 337-63, 341 (1988). Accord State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(Federal standards pertaining to the issuance of search warrants are applicable to the states.); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985)(The test of reasonableness for a search requires a balancing of the need for a particular search against the invasion of personal rights, and the court must consider the scope of the particular intrusion and

the manner in which it is conducted as well as the justification for initiating it.). Analyzing such a fourth amendment challenge, the United States Supreme Court issued two landmark decisions on March 21, 1989, concerning drug testing in the workplace. In Skinner v. Ry. Labor Executives' Ass'n, 57 U.S.L.W. 4324 (U.S. Mar. 21, 1989)(Justice Kennedy delivered the decision which was joined in whole or part, by six Justices, with two Justices dissenting), the Court addressed whether the fourth amendment was violated by regulations promulgated by the Federal Railroad Administration which mandate blood and urine tests of employees who are involved in certain train accidents and which authorize, but do not require, railroads to administer breath and urine tests to employees who violate certain safety rules. After acknowledging the protracted history of alcohol use on American railroad, the Court analyzed the threshold issues of whether the tests in question are attributable to the Government or its agent and whether they amount to searches and seizures. The Court first concluded that the fourth amendment was implicated as a result "of the Government's encouragement, endorsement, and participation" in this area. Id. at 4327. Then, relying on Schmerber v. California, 384 U.S. 757 (1966)(compelled intrusion into the body for blood to be analyzed for alcohol content deemed a fourth amendment search), the Court concluded that the breath-testing and urine-testing procedures must be deemed searches under the fourth amendment. Holding that the alcohol and drug tests contemplated by the regulations are reasonable within the meaning of the fourth amendment, the Court stated:

> In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired.

Id. at 4332. In Nat'l Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (U.S. Mar. 21, 1989)(Justice Kennedy delivered the decision which was joined by four Justices, with four Justices dissenting), the Court decided whether the United States Customs Service's requirement of a urinalysis test from employees who seek transfer or promotion to certain positions violates the fourth amendment.

> Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of customs agents. [Citation omitted.] The second criterion is a requirement that the incumbent carry firearms as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." [Citation omitted.] The third criterion is a requirement for the incumbent to handle "classified" material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. [Citation omitted.]

Id. at 4339. Citing Skinner v. Ry. Labor Executives' Ass'n, supra, the Court "reaffirm[ed] the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . ." and stated

> where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary, to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. . . .

Von Raab, supra at 4341. Balancing the public interest in the United States Customs Service's testing program against the privacy concerns implicated by the tests, the Court concluded, in Von Raab:

> We hold that the suspicionless testing of employees who apply for promotions to positions directly involving the interdiction of illegal drugs, or to positions which

> require the incumbent to carry a firearm, is reasonable. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. We do not decide whether testing those who apply for promotions where they would handle "classified" information is reasonable because we find the record inadequate for this purpose.

Id. at 4344. Whether or not a particular South Carolina statute authorizing random drug testing survives a constitutional challenge based upon fourth amendment grounds would depend, at least in part, upon its compliance with these court decisions.

Another constitutional challenge to random drug testing might be based upon due process grounds. See U.S. Const. amend. V & XIV. Cf. S.C. Const. art. I, §3 ("Privileges and immunities; due process; equal protection of laws."). Both substantive due process and procedural due process requirements are recognized within the protection of the fifth and fourteenth amendments of the United State Constitution. See, e.g., Hamilton v. Bd. of Trustees of Oconee County School Dist., 282 S.C. 519, 319 S.E. 2d 717 (Ct. App. 1984)(Upon analysis of the fifth and fourteenth amendments of the United States Constitution, substantive due process means state action which deprives a person of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary.); Beckman v. Harris, 756 F.2d 1032 (4th Cir.), cert. denied, 474 U.S. 903 (1985)(To be entitled to the procedural safeguards, i.e., notice and opportunity to be heard, encompassed by the due process clause of the fourteenth amendment, the complaining party must suffer from the deprivation of a liberty or property interest.). Challenges based upon substantive due process grounds to drug testing of employees have met with mixed success. Compare Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986)(drug testing violated the liberty and property reputational interests of the employees without affording them due process of law) with Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987)(requiring the employee to submit to urinalysis testing did not violate substantive due process

rights). Accord Ayers, supra. One legal periodical, analyzing drug testing in the workplace where the employee had a liberty or property interest, has stated: "[T]he employee is entitled to procedural due process consisting of proper notice and adequate opportunity to contest the results." Kelly, Constitutional Mandates for Drug Testing in the American Workplace, 13 Okla. City U.L. Rev. 109-34, 124 (1988)(citing Capua v. City of Plainfield, supra (finding more than the minimum procedural due process was required), and Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986)(a deprivation of property rights through the termination of employment must be preceded by notice and an opportunity to be heard)).[1] Upon application of this analysis, the success of a challenge based upon due process grounds to a statute authorizing random drug testing in the workplace would depend on numerous factors: for example, whether the drug testing was authorized in the public or private sector (for purposes of analyzing the state action issue), whether the employee had acquired a liberty or property interest in his employment (either in the public or private sector), and whether a rational basis (as ultimately determined by a court) exists for the random drug testing. As previously noted, your letter does not contain a copy of proposed legislation to enable a definitive analysis based upon such a due process challenge.

Random drug testing may also prompt a constitutional challenge, based upon the fourth amendment of the United States Constitution, by alleging infringement of the individual's protected privacy "interest in avoiding disclosure of personal matters." See Whalen v. Roe, 429 U.S. 589, 599 (1977). Federal courts have not generally embraced such challenges. Ayers, supra ("Federal court cases to date have generally rejected the argument that the constitutional right to privacy outweighs the employer's interest in drug testing or urinalysis. [Footnote

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[1] On November 17, 1987, the United States Court of Appeals, District of Columbia Circuit, reversed and vacated in part the decision in Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986). Id., reversed, 833 F.2d 335 (D.C. Cir. 1987)(holding that it was not unreasonable to require drug testing where an employee's duties involve direct contact with young school children and their physical safety, if the testing is conducted as part of a routine, reasonably required, employment-related medical examination, and there is a clear nexus between the test and the employer's legitimate safety concern).

omitted.]"). Accord Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986)(Citing Whalen v. Roe, supra, and acknowledging a right of privacy in medical information, the court concluded that the government's concern for racing integrity justified its access to the breathalyzer and urinalysis information of jockeys.). Similarly, challenges to drug testing based upon the privilege against self incrimination, see U.S. Const. amend. V, have not been successful because courts have considered the results of urine testing to be physical, not testimonial, evidence. Ayers, supra (citing Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), aff'd and vacated in part, 57 U.S.L.W. 4338 (U.S. Mar. 21, 1989)). Consequently, challenges based upon either of these two constitutional grounds may likewise prove to be unsuccessful against a proposed South Carolina statute.

In addition to these constitutional challenges, employees may criticize the actual drug tests. "[U]rinalysis screening is suspect in two critical areas: accuracy and utilization of results. [Footnote omitted.]" Note, supra, at 406.

Upon analyzing drug testing based upon some of the above factors, one legal periodical concluded:

> The ability of employers to take action in relation to their employees is represented by a continuum. At will employers are least constrained. Unionized employers are constrained by the labor agreements they have signed. Public employers are constrained by the Constitution.

Id. at 412.

Thus far, the United States Supreme Court has analyzed and decided a challenge to random drug testing based only upon fourth amendment grounds. In Skinner v. Ry. Labor Executives' Ass'n, supra, and Nat'l Treasury Employees Union v. Von Raab, supra, the Court recently announced that the need to detect drug use by persons in safety-sensitive and law enforcement jobs is sufficiently important to allow drug testing of those persons without a search warrant or individualized suspicion. Such drug testing, therefore, does not violate the fourth amendment. Whether or not challenges to random drug testing based on other grounds will meet a similar result before the Court remains to be seen.

Consequently, drug testing in the workplace raises numerous complex legal issues. The express language of a particular statute which authorizes drug testing would, of course, determine the success of any legal challenges against that statute. In addition, your inquiry obviously also involves resolution of various policy considerations by the South Carolina General Assembly in deciding whether to enact such legislation.

If I can answer any further questions, please advise me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

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