

EMPLOYEE STANDARDS OF CONDUCT
SEARCHES AND ALCOHOL/DRUG TESTING

DHB
(LEGAL)

Searches— General Rule

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. *U.S. Const. Amend. IV; Tex. Const. Art. I, Sec. 9*

A governmental entity, including a college district, may search an employee or an employee's property if:

1. The governmental entity has reasonable grounds to believe that the search will turn up evidence that the employee is guilty of work-related misconduct or that the search is necessary for a non-investigatory, work-related purpose; and
2. The search is reasonably related in scope to the circumstances that justified the interference in the first place.

City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 (2010); *O'Connor v. Ortega*, 480 U.S. 709 (1987)

Drug / Alcohol Testing

Blood, urine, and breath tests of public employees to determine drug use are searches under the Fourth Amendment of the U.S. Constitution. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989)

Random Drug Testing

A governmental entity may conduct drug tests, without a warrant and without individualized suspicion, when the test serves special governmental needs that outweigh the individual's privacy expectation. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)

Safety-Sensitive Positions

Random alcohol and drug testing of employees in "safety-sensitive" positions may be permissible when the intrusiveness of the search is minimal and the governing board of a governmental entity is able to demonstrate that the drug-testing program furthers its interest in ensuring the physical safety of students. "Safety-sensitive" positions include those that involve the handling of potentially dangerous equipment or hazardous substances in an environment including a large number of children. *Aubrey v. School Board of LaFayette Parish*, 148 F.3d 559 (5th Cir. 1998)

Note: The following testing requirements apply to every employee who operates a commercial motor vehicle and is subject to commercial driver's license requirements in accordance with federal regulations.

Testing of Drivers

An employer, including a college district, shall conduct testing, in accordance with federal regulations, of commercial motor vehicle

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operators for use of alcohol or a controlled substance that violates law or federal regulation. *49 U.S.C. 31306; 49 C.F.R. Part 382*

Commercial Motor Vehicle

A “commercial motor vehicle” means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle:

1. Has a gross combination weight rating or gross combination weight of 11,794 kilograms or more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds), whichever is greater; or
2. Has a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms (26,001 or more pounds), whichever is greater; or
3. Is designed to transport 16 or more passengers, including the driver; or
4. Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act, 49 U.S.C. 5103(b), and which require the motor vehicle to be placarded under the Hazardous Materials Regulations, 49 C.F.R. Part 172, Subpart F.

49 C.F.R. 382.107

Testing Procedures

Each employer shall ensure that all alcohol or controlled substances testing conducted under 49 C.F.R. Part 382 complies with the procedures set forth in 49 C.F.R. Part 40. *49 C.F.R. 382.105*

Tests Required

No driver shall refuse to submit to a preemployment controlled substance test required under 49 C.F.R. 382.301, a post-accident alcohol or controlled substances test required under 49 C.F.R. 382.303, a random alcohol or controlled substances test required under 49 C.F.R. 382.305, a reasonable suspicion alcohol or controlled substances test required under 49 C.F.R. 382.307, a return-to-duty alcohol or controlled substances test required under 49 C.F.R. 382.309, or follow-up alcohol or controlled substances test required under 49 C.F.R. 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions. *49 C.F.R. 382.211*

Education and Treatment

As an employer, a college district is not required to provide a substance abuse professional (SAP) evaluation or any subsequent recommended education or treatment for an employee who has violated a U.S. Department of Transportation (DOT) drug and alcohol regulation.

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However, if a college district offers that employee an opportunity to return to a DOT safety-sensitive duty following a violation, the college district must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP and that the employee successfully complies with the SAP's evaluation recommendations. Payment for SAP evaluations and services is left for employers and employees to decide and may be governed by existing management-labor agreements and health care benefits.

49 C.F.R. 40.289

Return-to-Duty
Testing

As the employer, if a college district decides that it wants to permit the employee to return to the performance of safety-sensitive functions, the college district must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties. *49 C.F.R. 40.305(a)*

As an employer, a college district must not return an employee to safety-sensitive duties until the employee meets the conditions of 49 C.F.R. 40.305(a). However, the college district is not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that the college district has the discretion to make, subject to legal requirements. *49 C.F.R. 40.305(b)*

Drug and Alcohol
Clearinghouse

The U.S. Secretary of Transportation shall establish, operate, and maintain a national clearinghouse for records relating to alcohol and controlled substances testing of commercial motor vehicle operators. The clearinghouse shall function as a repository for records relating to the positive test results and test refusals of commercial motor vehicle operators and violations by such operators of prohibitions set forth in 49 C.F.R. Part 382, Subpart B or any subsequent corresponding regulations. *49 U.S.C. 31306a(a)(1), (3)*

Annual Query

In accordance with 49 C.F.R. 382.701(b), employers must conduct a query of the clearinghouse at least once per year for information for all employees subject to controlled substance and alcohol testing under 49 C.F.R. Part 382 to determine whether information exists in the clearinghouse about those employees. *49 C.F.R. 382.701(b)(1)*

Prohibition

Except as described by 49 C.F.R. 382.701(d), no employer may allow a driver to perform any safety-sensitive function if the results of a clearinghouse query demonstrate that the driver has a verified

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positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of 49 C.F.R. 382.211; or that an employer has reported actual knowledge, as defined at 49 C.F.R. 382.107, that the driver used alcohol on duty in violation of 49 C.F.R. 382.205, used alcohol before duty in violation of 49 C.F.R. 382.207, used alcohol following an accident in violation of 49 C.F.R. 382.209, or used a controlled substance in violation of 49 C.F.R. 382.213. *49 C.F.R. 382.701(d)*

Recordkeeping

Employers must retain for three years a record of each query and all information received in response to each query. As of January 6, 2023, an employer who maintains a valid registration fulfills this requirement. *49 C.F.R. 382.701(e)*

Educational
Materials

Each employer shall provide educational materials that explain the requirements of 49 C.F.R. Part 382 and the employer's policies and procedures with respect to meeting these requirements. The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under Part 382 and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle. Each employer shall provide written notice to representatives of employee organizations of the availability of this information. The materials to be made available to drivers shall include detailed discussion of at least the items listed at 49 C.F.R. 382.601. Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver. *49 C.F.R. 382.601*

Reports

Federal

Employers must report the following information about a driver to the clearinghouse by the close of the third business day following the date on which they obtained that information:

1. An alcohol confirmation test result with an alcohol concentration of 0.04 or greater;
2. A negative return-to-duty test result;
3. A refusal to take an alcohol test pursuant to 49 C.F.R. 40.261;
4. A refusal to test determination made in accordance with 49 C.F.R. 40.191(a)(1) through (4), (a)(6), (a)(8) through (11), or (d)(1), but in the case of a refusal to test under 49 C.F.R. 40.191(a)(11), the employer may report only those admissions made to the specimen collector; and

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5. A report that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with 49 C.F.R. 40.307, 40.309, and 40.311.

An employer must report the following violations by the close of the third business day following the date on which the employer obtains actual knowledge, as defined at 49 C.F.R. 382.107, of:

1. On-duty alcohol use pursuant to 49 C.F.R. 382.205;
2. Pre-duty alcohol use pursuant to 49 C.F.R. 382.207;
3. Alcohol use following an accident pursuant to 49 C.F.R. 382.209; and
4. Controlled substance use pursuant to 49 C.F.R. 382.213.

The reports must contain the information described by 49 C.F.R. 382.705(b).

Any employer may designate a consortium/third-party administrator (C/TPA) to perform the employer reporting requirements. Regardless of whether it uses a C/TPA to perform its requirements, the employer retains ultimate responsibility for compliance with the reporting requirements.

49 C.F.R. 382.107, .705(b)–(c)

State

An employer required to conduct alcohol and drug testing of an employee who holds a commercial driver's license under Transportation Code Chapter 522 under federal safety regulations as part of the employer's drug testing program or consortium, as defined by 49 C.F.R. Part 382, shall report the following information to the Department of Public Safety:

1. A valid positive result on an alcohol or drug test performed and whether the specimen producing the result was a dilute specimen. "Valid positive result" means an alcohol concentration of 0.04 or greater on an alcohol confirmation test, or a result at or above the cutoff concentration levels listed in 49 C.F.R. 40.87 on a confirmation drug test. "Dilute specimen" means a urine specimen with creatinine and specific gravity values that are lower than expected for human urine.
2. A refusal to provide a specimen for an alcohol or drug test.
3. An adulterated specimen or substituted specimen, as those terms are defined by 49 C.F.R. 40.3, on an alcohol or drug test performed.

For purposes of this requirement, "employee" means any person who is designated in a U.S. Department of Transportation (DOT)

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agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to preemployment testing.

Transp. Code 644.251–.252; 49 C.F.R. 40.3