



# Office of the Attorney General of Guam



590 S. Marine Corps Dr., Ste. 901, Tamuning, Guam 96913

Elizabeth Barrett-Anderson  
**Attorney General**  
Phone: (671) 475-3324  
ext. 5015/ 5030  
Fax: 477-4703  
[law@guamag.org](mailto:law@guamag.org)

Jacqueline Z. Cruz  
Chief of Staff  
**Administration**  
ext. 5010  
[izcruz@guamag.org](mailto:izcruz@guamag.org)

Joseph B. McDonald  
Chief Prosecutor  
**Prosecution**  
ext. 2084  
[jmcdonald@guamag.org](mailto:jmcdonald@guamag.org)

Karl P. Espaldon  
Deputy AG  
**Solicitors**  
ext. 3115  
[kespaldon@guamag.org](mailto:kespaldon@guamag.org)

Kenneth D. Orcutt  
Deputy AG  
**Litigation**  
ext. 3225  
[korcutt@guamag.org](mailto:korcutt@guamag.org)

Fred S. Nishihira  
Deputy AG  
**Consumer Protection**  
ext. 3250  
[fnishihira@guamag.org](mailto:fnishihira@guamag.org)

Rebecca M. Perez  
Deputy AG  
**Child Support**  
ext. 1610  
[rebecca.perez@guamcse.net](mailto:rebecca.perez@guamcse.net)

Carol M. Hinkle-Sanchez  
Deputy AG  
**Juvenile**  
ext. 4040  
[csanchez@guamag.org](mailto:csanchez@guamag.org)

Pauline I. Untalan  
Administrator  
**Victim Service Center  
& Notary Unit**  
ext. 5030  
[puntalan@guamag.org](mailto:puntalan@guamag.org)

October 6, 2017

## OPINION MEMORANDUM

Ref: LEG 17-0547

Honorable Telen Cruz Nelson  
Chairperson, Committee on Housing, Utilities, Public Safety  
& Homeland Security  
*I Mina'trentai Kuattro Na Liheslaturan Guåhan*  
Guam Congress Building  
163 Chalan Santo Papa  
Hagåtña, Guam 96910

Re: Opinion Request Relative to Random Drug Testing for  
All Government Employees

*Håfa Adai* Senator:

This Office is in receipt of your email regarding legislation that you intend to introduce requiring random drug testing for *all* government of Guam employees. Thank you for your preliminary efforts in seeking our Office's legal perspective on such a dramatically proactive piece of legislation.

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" It protects individuals from unreasonable searches conducted by the government, even when the government acts as employer. *National Treasury Employees Union, et al., v. Von Raab*, 489 U.S. 656 (1985). The collection and testing of blood, breath, or urine intrudes upon reasonable expectations of privacy such that these intrusions are deemed searches under the Fourth Amendment of the United States Constitution. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989). To be upheld under the Fourth Amendment, the drug testing of a public employee must be based on a reasonable suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

Random drug testing of all government employees based only on a general need to deter drug use by government employees has been deemed insufficient. "*Chandler* makes clear that the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal problem."



*Lanier v. City of Woodburn*, 518 F.3d 1147, 1150-51 (9th Cir. 2008). “In order to pass constitutional muster, the [government employer] has the burden of demonstrating a ‘special need’ to conduct suspicionless searches of its prospective employees.” *Taylor-Failor v. County of Hawaii*, 90 F.Supp.3d 1095, 1099 (D. Hawaii 2015) (quoting *Chandler*, 520 U.S. at 318).

Courts evaluate “special need” using a two-step inquiry. First, courts examine whether the search serves a “special governmental need” beyond crime detection. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Then, “[o]nly if the government is able to make a showing of substantial special needs will the court thereafter ‘undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties,’ to determine the reasonableness of the search.” *Lebron v. Sec’y, Fla. Dept. of Children & Families*, 710 F.3d 1202, 1207 (11th Cir. 2013) (citing *Chandler*, 520 U.S. at 314, 117 S.Ct. 1295); *Von Raab*, 489 U.S. at 665–66, 109 S.Ct. 1384. The “permissibility of a particular search 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 (citation omitted). *Taylor-Failor*, 90 F.Supp.3d at 1099-1100.

In limited circumstances, where the government employee’s privacy interests implicated by the search are minimal, and where an important governmental interest to be furthered by the intrusion would be jeopardized by requiring individualized suspicion, a suspicionless search may be reasonable. *Skinner*, 489 U.S. at 602. In *Skinner* the Court upheld a federal drug testing program for railroad employees noting that railroad employees’ duties are fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. In *Von Raab* the Court upheld the U.S. Customs Service program’s need to conduct suspicionless searches against the privacy interests of employees directly engaged in drug interdiction, and of those otherwise required to carry firearms. *Von Raab*, 489 U.S. at 668.

Interpreting *Von Raab* to hold that the government may search its employees only when a clear, direct nexus exists between the nature of the employee’s duty and the nature of the feared violation, the Court of Appeals for the D.C. Circuit upheld random testing for Justice Department employees with access to top secret classified information. *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1056 (1990). However, the court found that the government’s interests in work force integrity, public safety, and protection of sensitive information did not justify a plan for random testing of employees in less sensitive positions under the Fourth Amendment.

Random drug testing has been found permissible for aviation workers, police guards, and drug counselors. *See, National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Unannounced drug testing in the Cook County Department of Corrections was required to be limited to employees with regular prisoner contact, with opportunities to smuggle drugs, or with access to firearms. *Taylor v. O’Grady*, 888 F.2d 1189 (7th Cir. 1989). The Supreme Court of California has held that while there is a sufficiently important governmental interest to justify the suspicionless drug testing for employment

positions involving the interdiction of drugs, the carrying of firearms, and the handling of truly sensitive information, it is not constitutionally permissible for a governmental employer to conduct suspicionless urinalysis drug testing of all current employees seeking promotion, regardless of the nature of the position at issue. *Loder v. City of Glendale*, 14 Cal.4th 846, 922 P.2d 1200, 59 Cal. Rptr.2d 696 (1997).

Job positions where suspicionless drug testing was found to be impermissible include: library workers: *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008); railroad mail clerks: *Liverpool v. New York City Transit Authority*, 835 F.Supp. 1440 (E.D. N.Y. 1993) *aff'd without opinion*, 41 F.3d 1501 (2nd Cir. 1994); bus depot custodians: *Bolden v. Southeastern Pa. Transportation Authority*, 953 F.2d 807 (3rd Cir. 1991), *cert. denied*, 504 U.S. 943 (1992); federal prosecutors who prosecute drug cases: *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1056 (1990); cooks and painters aboard ships: *Transportation Inst. v. United States Coast Guard*, 727 F.Supp. 648 (D. D.C. 1989); and U.S.D.A. Food and Nutrition Service computer specialists, motor vehicle operators, and non-management non-law enforcement plant protection and quarantine officers who do not carry weapons and are not authorized to make arrests: *National Treasury Employees Union v. Ling*, 706 F.Supp. 934 (D. D.C. 1988).

In summary, a broad brushed attempt to institute random, suspicionless drug testing of all government of Guam employees without regard to the nature of the employee's duties and the specific violation intended to be addressed will offend constitutional protections against warrantless searches.

Respectfully,



**ELIZABETH BARRETT-ANDERSON**  
Attorney General

cc: Acting Governor Ray Tenorio  
DOA Director Christine Baleto