

August 26, 2014

The Honorable David Kelley  
Adams County Prosecuting Attorney  
110 West Main Street  
Courthouse  
West Union, Ohio 45693

SYLLABUS:

2014-034

A board of county commissioners that purchases group health care insurance for county employees and their spouses pursuant to R.C. 305.171 may set premium rates on the basis of the use of tobacco by a county employee or the employee's spouse. The board of county commissioners must have a reasonable basis for making that distinction and all similarly situated county personnel must pay the same insurance premium and receive equal benefits under the policy of group health care insurance.



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OPINION NO. 2014-034

The Honorable David Kelley  
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Dear Prosecutor Kelley:

You have requested an opinion whether a board of county commissioners may set county health care insurance premiums based upon the tobacco use of county employees and their spouses.<sup>1</sup> You also ask whether a board of county commissioners may require county employees and their spouses who receive county health care insurance to be tested<sup>2</sup> for tobacco use.

### **Health Care Insurance Premium Rates Based upon Tobacco Use**

As a creature of statute, a board of county commissioners has only such authority as is expressly provided by statute, or as may be necessarily implied thereby. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917) (“[s]uch grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective”); *Britt v. Franklin Cnty. Comm’rs*, 148 Ohio App. 3d 395, 2002-Ohio-3679, 773 N.E.2d 612, at ¶19 (Franklin County); *see, e.g.*, 2009 Op. Att’y Gen. No. 2009-038, at 2-283. With respect to the authority of a board of county commissioners to obtain group insurance policies, R.C. 305.171(A) states, in pertinent part:

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<sup>1</sup> We understand “county health care insurance” to mean the group insurance policies that are procured by a board of county commissioners for county officers, county employees, and their immediate dependents under R.C. 305.171(A)(1).

<sup>2</sup> Your letter does not indicate how an employee or an employee’s spouse would be tested for tobacco use. Urinalysis is one way to test for the presence of nicotine. *See Rodrigues v. E.G. Sys., Inc.*, 639 F. Supp. 2d 131, 133 (D. Mass. 2009). For the purpose of this opinion, we assume that a board of county commissioners will require employees and their spouses to undergo urinalysis to determine whether they are tobacco users.

[t]he board of county commissioners of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of any of the following insurance, coverage, or benefits issued by an insurance company or administered by a board of county commissioners or a contractor, for county officers and employees and their immediate dependents from the funds or budgets from which the county officers or employees are compensated for services:

- (1) Group insurance policies that may provide any of the following:
  - (a) Benefits including, but not limited to, hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs;
  - (b) Sickness and accident insurance;
  - (c) Group legal services;
  - (d) Group life insurance.

Based upon the plain language of R.C. 305.171(A), a board of county commissioners may “pay all or any part of the cost” of group insurance policies procured for county officers and employees. *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181, 480 N.E.2d 758 (1985) (“[i]t is obvious, from the plain language of [R.C. 305.171(A)], that the board of county commissioners is under no obligation to pay the whole premium for health insurance of county employees”).

A board of county commissioners’ procurement of group health care insurance policies and the payment of all or part of the cost of a group health care insurance policy under R.C. 305.171(A) is a component of a county employee’s compensation. *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) (“payment of [health care insurance] premiums for the benefit of a public official must be considered a part of the compensation for that office”); 2005 Op. Att’y Gen. No. 2005-031, at 2-324 (“[t]hrough the enactment of R.C. 305.171, the General Assembly has authorized boards of county commissioners, in accordance with the terms of that statute, to fix the health care benefit component of the compensation of county personnel”) (footnote omitted); *see Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (syllabus, paragraph 1) (“[a]s to each county employee receiving the rights to the benefits of a group health insurance plan procured by a board of county commissioners pursuant to [R.C. 305.171], that part of the premium which is paid from public funds is a part of the cost of the public service performed by each such employee”).<sup>3</sup>

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<sup>3</sup> “Health care insurance coverage is commonly understood to be a ‘fringe benefit,’ and when it is provided as a benefit of employment, it is part of the employees’ compensation that may be fixed by county appointing authorities.” 2011 Op. Att’y Gen. No. 2011-015, at 2-145. Because health care insurance is a part of an employee’s compensation, an employee’s appointing authority may elect to pay a greater portion of the health care insurance premium than is paid by the board of county commissioners. 2004 Op. Att’y Gen. No. 2004-004, at 2-34 (“an individual county appointing authority may choose to increase its employees’ compensation by paying a greater portion of its employees’ health insurance premiums than the county commissioners have elected to pay for other county personnel”); *see also* 2011 Op. Att’y Gen. No. 2011-015, at 2-145 to 2-147; 1995 Op. Att’y

“Nothing in R.C. 305.171 ... requires a board of county commissioners to provide uniform health insurance coverage for all county personnel or to provide health care insurance to all county personnel on the same terms.” 2004 Op. Att’y Gen. No. 2004-004, at 2-33 (footnote omitted); *accord* 2005 Op. Att’y Gen. No. 2005-046, at 2-500; 1980 Op. Att’y Gen. No. 80-030, at 2-128. The discretion afforded a board of county commissioners by R.C. 305.171 includes the discretion to set different premiums for health care insurance for different categories of county personnel and their dependents. *See* 2005 Op. Att’y Gen. No. 2005-046, at 2-499 to 2-500 (a county may offer county employees health care insurance under different policies that are based on different terms, including different premium rates, than those policies offered to county officers); 2004 Op. Att’y Gen. No. 2004-004, at 2-37 (“R.C. 305.171 does not require a board of county commissioners to pay the same percentage of premium on behalf of those county employees who receive family coverage as it pays on behalf of those who receive only individual coverage, so long as the county has a rational basis for making such distinction”); *cf.* 1990 Op. Att’y Gen. No. 90-064, at 2-272 (“pursuant to R.C. 505.60(A), the board of township trustees may procure health insurance benefits which offer uniform coverage to township officers and full-time employees and their immediate dependents, while paying only that portion of the insurance premium attributable to the officer or employee”).

A board of county commissioners’ discretion to make distinctions in health care insurance benefits among different groups of county personnel is not unfettered. Distinctions may be made among groups of county personnel, and their immediate dependents, so long as there is a reasonable basis for those distinctions and all county personnel that are similarly situated are provided equal benefits. 2004 Op. Att’y Gen. No. 2004-004, at 2-34 (“[i]n exercising its authority under R.C. 305.171, a board of county commissioners must, of course, exercise a reasonable discretion and have

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Gen. No. 95-027, at 2-138 (“[t]he county children services board, as the appointing authority of its employees, may provide them with health insurance benefits in excess of those granted by the county”).

Although a board of county commissioners has authority to procure and pay all or part of the cost of group health care insurance that is available to all county officers and employees, R.C. 305.171(A), a board of county commissioners has the authority to determine the compensation of only county personnel for whom the board is the appointing authority. R.C. 305.17 (a board of county commissioners sets the compensation of county personnel employed or appointed under R.C. 305.13-.16); *see* 2008 Op. Att’y Gen. No. 2008-012, at 2-136; 1982 Op. Att’y Gen. No. 82-071, at 2-201 n.1. A board of county commissioners is the appointing authority of the following county personnel: a clerk of a board of county commissioners, R.C. 305.13; legal counsel in addition to or in place of the county prosecuting attorney, R.C. 305.14(A), (B); an additional engineer, “assistant engineers, rodmen, and inspectors[,]” R.C. 305.15; and “a superintendent, ... watchmen, janitors, and other employees as are necessary for the care and custody of” county property, R.C. 305.16. *See* R.C. 305.17; *see* 1984 Op. Att’y Gen. No. 84-092, at 2-316 n.3. The county officers listed in R.C. 325.27 are the appointing authorities of other county employees. R.C. 325.17; *see* 1982 Op. Att’y Gen. No. 82-071, at 2-201 n.1.

a rational basis for any differences in benefits it awards to county personnel”); 2003 Op. Att’y Gen. No. 2003-019, at 2-154 (“[i]n providing fringe benefits, an appointing authority may make reasonable distinctions among groups of employees, but must provide equal benefits to all employees who are similarly situated”). Any differences in health care insurance coverage among categories of personnel or the terms upon which such coverage is available “must comport with the equal protection guarantees of Ohio Const. art. I, § 2 and the fourteenth amendment of the United States Constitution.” 1981 Op. Att’y Gen. No. 81-082, at 2-323 (footnote omitted); *accord* 1982 Op. Att’y Gen. No. 82-071, at 2-202.<sup>4</sup>

Insofar as a board of county commissioners’ discretion to impose different premiums for different categories of county personnel is implicit in R.C. 305.171, it follows that a board of county commissioners may select different factors that enable the board to arrive at those premium rates. The tobacco use of employees and their spouses who receive county health care insurance may be a factor that is relied upon by the board to set premium rates.<sup>5</sup>

A relationship exists between the use of tobacco products and the cost of providing health care insurance to a tobacco user. *See* Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 Iowa L. Rev. 571, 581 (2014) (“[a]s a group, smokers and other nicotine users face more health risks than people who do not use tobacco, thus making them more expensive to insure”) (footnote omitted). More than 480,000 Americans die each year as a result of smoking tobacco. Centers for Disease Control and Prevention, *Cigarette Smoking in the United States*, <http://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html#one> (last visited Aug. 7, 2014). Ninety percent of deaths from lung cancer and eighty to ninety percent of deaths from chronic obstructive pulmonary disease (emphysema and chronic bronchitis) are

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<sup>4</sup> Federal laws and regulations limit the amount by which a premium rate may vary based upon an insured’s use of tobacco. *See, e.g.*, 42 U.S.C.A. § 300gg(a)(1)(A)(iv) (premium rate may vary based upon “tobacco use, except that such rate shall not vary by more than 1.5 to 1”); 26 C.F.R. § 54.9802-1(f)(1)(i) (defining reward), (f)(1)(v) (defining outcome-based wellness programs), (f)(4)(ii) (limits on size of reward), (f)(5)(i) (the applicable percentage to be used in setting the size of the reward is 30% or 50% if the reward is offered as part of a program to lower use of tobacco); 29 C.F.R. § 2590.702(f)(1)(i) (defining reward), (f)(1)(v) (defining outcome-based wellness programs), (f)(4)(ii) (limits on size of reward), (f)(5)(i) (the applicable percentage to be used in setting the size of the reward is 30% or 50% if the reward is offered as part of a program to lower use of tobacco); 45 C.F.R. § 146.121(f)(1)(i) (defining reward), (f)(1)(v) (defining outcome-based wellness programs), (f)(4)(ii) (limits on size of reward), (f)(5)(i) (the applicable percentage to be used in setting the size of the reward is 30% or 50% if the reward is offered as part of a program to lower use of tobacco).

<sup>5</sup> Whether, in a particular situation, imposing health care insurance premiums based upon tobacco use is a reasonable exercise of discretion and is supported by a reasonable basis is a question that must be answered by local officials or the judiciary. *See* 1982 Op. Att’y Gen. No. 82-071, at 2-202.

attributable to smoking. Am. Lung Assoc., *Smoking*, <http://www.lung.org/stop-smoking/about-smoking/health-effects/smoking.html#1> (last visited Aug. 6, 2014). “Smoking ... is a main cause of lung cancer and chronic obstructive pulmonary disease (COPD, including chronic bronchitis and emphysema)[,]” as well as “a cause of coronary heart disease, stroke and ... other cancers and diseases.” *Id.* (footnote omitted). The United States incurs an annual cost of more than \$289 billion as a result of smoking-related illness. Centers for Disease Control and Prevention, *Cigarette Smoking in the United States*, <http://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html#one> (last visited Aug. 7, 2014). This cost includes “at least \$133 billion in direct medical care for adults and \$156 billion in lost productivity.” *Id.* (footnote omitted). “A smoker costs a private employer in the United States an extra \$5,816 per year compared with a nonsmoker[.]” Sophie Egan, *The Cost of a Smoker: \$5,816*, *The New York Times* (Aug. 7, 2013), <http://well.blogs.nytimes.com/2013/08/07/the-cost-of-a-smoker-5816/>. Of that \$5,816 additional cost, \$2,056 per year was attributable to health care costs for an individual smoker. *Id.*

Over the last decade, the cost of “employer-provided insurance has more than doubled[.]” Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 *Iowa L. Rev.* 571, 581 (2014). “In 2012, the average annual premiums in the United States were \$5615 for individual coverage and \$15,745 for family coverage.” Brian Wall, *Lighten Up: Should Massachusetts Implement a Smoking Surcharge for State Employees?*, 46 *Suffolk U. L. Rev.* 1223, 1236-1237 (2013) (footnote omitted). The majority of those premiums are paid by employers, such that employer contributions “account[] for approximately 83% of the premium for individual coverage and 73% of the premium for family coverage.” *Id.* at 1237 (footnote omitted). The higher incidence of chronic illness among tobacco users coupled with rising health care insurance costs present a significant fiscal challenge to public and private employers. As a result, smoking-related personnel policies have become more common.<sup>6</sup> Thus, a board of county commissioners may emphasize the significant expense incurred by a county in providing health care insurance to tobacco users when asserting that

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<sup>6</sup> For example, some public and private employers have instituted policies prohibiting the hiring of smokers. *See, e.g., Rodrigues v. EG Sys., Inc.*, 639 F. Supp. 2d 131, 133 (D. Mass. 2009) (private company’s policy prohibits hiring smokers and requires applicants for employment to be tested for nicotine); *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1026 (Fla. 1995) (as a cost-reducing measure and to improve productivity, the city passed a regulation requiring all applicants for employment “to sign an affidavit stating that they have not used tobacco or tobacco products for at least one year immediately preceding their application for employment”). In addition, several states, including West Virginia, Kentucky, Alabama, Georgia, Indiana, Kansas, Missouri, North Carolina, South Carolina, and South Dakota, charge state employees premiums for health care insurance based upon an employee’s status as a smoker or non-smoker (a “premium surcharge for smokers”). Nat’l Conference of State Legislatures, *State Employee Health Benefits*, <http://www.ncsl.org/research/health/state-employee-health-benefits-ncsl.aspx> (last visited Aug. 7, 2014).

charging premium rates for health care insurance based upon tobacco use is supported by a reasonable basis.<sup>7</sup>

### **Policy Requiring Testing for Tobacco Use**

Your second question asks whether a board of county commissioners may require county employees and their spouses who receive county-provided group health care insurance to be tested for tobacco use. We are unable to provide a definitive answer to this question, which presents issues of a constitutional magnitude. As will be discussed below, a county that requires urinalysis to detect tobacco use conducts a search under the Fourth Amendment to the United States Constitution.<sup>8</sup> We will examine and explain the pivotal cases that have established the analysis used to determine whether a government entity's use of that kind of testing is reasonable under the Fourth Amendment.

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<sup>7</sup> In *City of N. Miami v. Kurtz*, 653 So. 2d at 1026-29, the Florida Supreme Court considered whether the City of North Miami's policy of requiring applicants to affirm that they have refrained from tobacco use for one year prior to applying violated an applicant's right to privacy under the Florida and United States Constitutions. In concluding that the policy did not violate constitutional privacy protections, the court found that the city's interest that was served by the policy (reducing health care insurance costs and increasing productivity) was a compelling interest. *Id.* at 1028-29. Although not controlling precedent in Ohio, this case serves as an example of how a court has viewed a government entity's interest in reducing health care insurance costs in the face of a constitutional challenge.

<sup>8</sup> The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14 of the Ohio Constitution mirrors the language of the Fourth Amendment and states:

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

Insofar as Article I, Section 14 of the Ohio Constitution and the Fourth Amendment to the United States Constitution are nearly the same, we consider case law interpreting the Fourth Amendment to inform our understanding of the protections of Article I, Section 14. *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, at ¶22.

When a government entity requires a person to undergo urinalysis or blood testing, the government entity conducts a search for purposes of the Fourth Amendment. *Int'l Union v. Winters*, 385 F.3d 1003, 1007 (6th Cir. 2004) (“[i]t is beyond dispute that government ordered collection and testing of urine samples effects a search within the meaning of the Fourth Amendment as such tests intrude upon reasonable expectations of privacy that society has long recognized as reasonable”); *Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) (“it is altogether evident that mandatory urinalysis testing, conducted pursuant to state action, infringes an employee’s reasonable expectation of privacy and therefore constitutes a search under the fourth amendment”); *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, at ¶23 (“the collection and subsequent analysis of biological samples obtained through blood, breath, or urine testing ‘must be deemed Fourth Amendment searches’” (quoting *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. 602, 618, 109 S.Ct. 1402 (1989))). The protections of the Fourth Amendment apply when a government entity is acting within its role of employer and the subject of the search is not accused of a crime. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384 (1989); *Cassady v. Tackett*, 938 F.2d 693, 696 (6th Cir. 1991) (“[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior” (quoting *Camara v. Mun. Court*, 387 U.S. 523, 530, 87 S.Ct. 1727 (1967))).<sup>9</sup>

The Fourth Amendment prohibits government searches that are unreasonable. *Knox Cnty. Educ. Assoc. v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 371 (6th Cir. 1998). Typically, a search is reasonable under the Fourth Amendment when it is conducted “pursuant to a warrant issued upon a showing of probable cause” or individualized suspicion. *Id.* at 373. In the absence of probable cause and individualized suspicion, a search may nevertheless be reasonable if the government has sufficient special needs that make obtaining a warrant supported by probable cause impractical. *Int’l Union v. Winters*, 385 F.3d at 1007; *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.* at ¶24-27. The Ohio Supreme Court has stated, “[t]he ‘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.” *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.* at ¶27. Courts do not “merely accept a state’s invocation of special needs, but rather must engage in a context-specific inquiry, examining closely the interest advanced by the state.” *Int’l Union v. Winters*, 385 F.3d at 1009.

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<sup>9</sup> A search conducted by a private entity is considered a government search when there is a sufficient nexus between the government and the search such that the action of the private entity constitutes state action. *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, at ¶15, 19. The circumstances in which a private entity’s action may constitute “‘state action’ include those in which the private activity results from the state’s exercise of coercive power, when the state provides significant encouragement for the activity, either overt or covert, or when a private actor operates as a willful participant in joint activity with the state or its agents.” *Id.* at ¶14.



In order to constitute special needs, the government's purpose in conducting a search must not be solely law enforcement and the purpose cannot be "merely hypothetical[.]" *Int'l Union v. Winters*, 385 F.3d at 1012; *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers' Comp.* at ¶25. "[T]he proffered special need ... 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*, 520 U.S. 305, 318, 117 S.Ct. 1295 (1997). In *Skinner*, the Court evaluated federal regulations that required railroad employees to submit to breath, urinalysis, and blood testing in certain circumstances. *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. 602, 608-12, 109 S.Ct. 1402 (1989). The Court noted that the drug-testing requirement was not imposed for a law enforcement purpose, but "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 620-21 (quoting the regulation then in effect, 49 C.F.R. § 219.1(a) (1987)). After recognizing a history of alcohol and drug use by railroad employees and the substantial harm that train accidents involving impaired workers cause, the Court found "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety" constituted special needs. *Id.* at 606-08, 620. In concluding that a warrant was not necessary to comply with the Fourth Amendment, the Court stated "imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program." *Id.* at 624. The testing was standardized and involved the exercise of little discretion by the people charged with performing the requirements of the regulations. *Id.* at 622. In addition, because evidence of the presence of alcohol or drugs in a person's system is time-sensitive, requiring an employer to obtain a warrant prior to conducting the testing in the wake of an accident could result in lost evidence. *Id.* at 623.

Similarly, in *Von Raab*, the Court considered whether the United States Customs Service's drug-testing program that required drug-testing as a condition of being placed in a position of employment that involved participation in drug interdiction, carrying a firearm, or handling classified material was reasonable under the Fourth Amendment. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. at 659-61. The Court concluded the government's interest in "[detering] drug use among those eligible for promotion to sensitive positions ... and [preventing] the promotion of drug users to those positions" constituted special needs. *Id.* at 666. Based on the circumstances of that case, the Court concluded that "requiring a warrant ... would serve only to divert valuable agency resources from the Service's primary mission." *Id.* "Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy[.]" when the program narrowly defined the circumstances in which testing was required, the circumstances were known to the employees in advance, and there was no exercise of discretion in determining which employees to test. *Id.* at 667. In summarizing the compelling government interest, the Court stated "[i]n light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable." *Id.* at 674.

In *Vernonia*, the Court considered a public school's "Student Athlete Drug Policy[.]" which "authorize[d] random urinalysis drug testing of students who participate[d] in the District's school athletics programs." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 115 S.Ct. 2386 (1995). The

Court reiterated that “‘special needs’... exist in the public school context [where] the warrant requirement ‘would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,’ and ‘strict adherence to the requirement that searches be based upon probable cause’ would undercut ‘the substantial need of teachers and administrators for freedom to maintain order in the schools.’” *Id.* at 653 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 341, 105 S.Ct. 733 (1985)).

The government interests advanced in *Skinner*, *Von Raab*, and *Vernonia*, which were deemed special needs, are in contrast to the government interests involved in *Chandler v. Miller*, 520 U.S. at 321-22, *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1139-40 (E.D. Mich. 2000), *aff’d en banc by an equally divided court*, 60 Fed. Appx. 601 (6th Cir. 2003), and *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.* at ¶43, which did not constitute special needs. In *Chandler*, the Court considered Georgia’s statute requiring “candidates for designated state offices to certify that they have taken a drug test and that the test result was negative.” *Chandler v. Miller*, 520 U.S. at 308. The Court questioned whether the government need was hypothetical in *Chandler* insofar as the evidence failed to demonstrate that the danger of state officeholders using illegal drugs was a concrete or real risk. *Id.* at 318-19. Because candidates decided when the testing would occur, and those that were not addicted could refrain from drug use prior to the test, the program was not likely to be effective in identifying drug users or deterring drug use. *Id.* at 319-20. In addition, there was no demonstration that the typical means of drug enforcement would be ineffective in identifying candidates or officeholders who are addicted. *Id.* at 320. Unlike the customs employees subject to testing in *Von Raab*, the candidates subject to testing in *Chandler* were routinely subject to intense public scrutiny. *Id.* at 321. Those factors led the Court to conclude that the government need was symbolic, rather than a special need. *Id.* at 321-22 (“[w]hat is left, after close review of Georgia’s scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse.... However well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol’s sake”).

In *Marchwinski*, the court considered Michigan’s requirement that all recipients of Temporary Assistance for Needy Families (TANF) benefits be tested “for use of controlled substances[.]” *Marchwinski v. Howard*, 113 F. Supp. 2d at 1136. Michigan asserted that the mandatory drug testing was needed to assist families in transitioning from dependence upon public benefits to obtaining continuous employment. *Id.* at 1140. Relying upon the analysis applied in *Chandler*, the court concluded that Michigan’s testing program was not supported by sufficient special needs to conduct suspicionless searches of every benefit recipient. *Id.* at 1139-40. The court stated “[t]he State has not shown that public safety is genuinely placed in jeopardy in the absence of drug testing of all [Family Independence Program (FIP)] applicants and of random, suspicionless testing of FIP recipients.” *Id.* at 1140.

In *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.*, the court considered whether “warrantless drug and alcohol testing of injured workers” was reasonable under the Fourth Amendment and Article I, Section 14. *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.* at ¶1. A positive test result or the refusal of a worker to be tested created a rebuttable presumption that the accident was proximately caused by being intoxicated or under the influence of a

controlled substance. *Id.* at ¶5-6. If an injury was proximately caused by being intoxicated or under the influence of a controlled substance, the worker involved was excluded from receiving workers' compensation benefits. *Id.* at ¶4. The court concluded that the warrantless testing of workers was not supported by special needs. *Id.* at ¶43-47. The court stated:

[the testing program] does not target a group of people with a documented drug and alcohol problem. It is not directed at a segment of the population with drug use known to be greater than that of the general population – its target group *is* the general population. It does not target a segment of industry where safety issues are more profound than in other industries. It does not target certain job categories where drug or alcohol use would cause a substantial danger to workers, co-workers, or the general public.

*Id.* at ¶43. The court summarized the circumstances in which the United States Supreme Court allowed testing without a warrant based upon special needs:

In the cases where the court has allowed the suspicionless drug testing, the targeted individuals either have a demonstrated history of abuse, e.g., *Skinner* and *Vernonia*, hold a unique position, e.g., *Von Raab*, or have the potential for creating risks of catastrophe if under the influence of a mind-altering substance, e.g., *Von Raab* and *Skinner*. The overriding idea is that the situations and targeted groups are unique and discrete.

*Id.* at ¶42. Suspicionless searches that are reasonable under the Fourth Amendment have been described as a “closely guarded category[.]” *Chandler v. Miller*, 520 U.S. at 309; accord *State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers’ Comp.* at ¶40, 43.

Once sufficient special needs have been identified, the government’s interest in conducting the search must then be weighed against the degree to which the search intrudes on a person’s privacy interests. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 664-65; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. at 668; *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. at 633; *Int’l Union v. Winters*, 385 F.3d at 1012. With respect to assessing the government’s interest, the Court evaluates whether the interest is compelling and immediate, as well as whether the particular testing method effectively serves the program’s intended purpose. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 660; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. at 668-71; *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. at 628-33. The Court in *Vernonia* clarified that the requisite interest is “an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 661.

When evaluating the privacy interests affected by a search, courts look at the circumstances of obtaining the sample, which include a consideration of the information that is revealed by the testing, whether the employer or a neutral party conducts the testing and receives the results, whether the employee has advance notice of the testing requirement and the scheduled date of the test, and the extent of monitoring that the person experiences while the sample is obtained. See *Vernonia Sch.*

*Dist. 47J v. Acton*, 515 U.S. at 658-60; *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. at 672 n.2; *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. at 624-27; *Int'l Union v. Winters*, 385 F.3d at 1013. In addition, evaluation of the affected privacy interests requires a consideration of whether the persons tested have a diminished expectation of privacy. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 656-57; *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. at 671-72; *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. at 627-28; *Int'l Union v. Winters*, 385 F.3d at 1012. Courts have found a diminished expectation of privacy when the tested persons work in a highly regulated field or are in a heavily regulated environment, such as students in a school. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 656-57; *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. at 671-72; *Skinner v. Ry. Labor Execs. Assoc.*, 489 U.S. at 627-28; *Int'l Union v. Winters*, 385 F.3d at 1012; *cf. State ex rel. Ohio AFL – CIO v. Ohio Bureau of Workers' Comp.* at ¶47, 49-52 (workers' expectation of privacy outweighed government's interest in testing because "in Ohio, workers have an additional expectation of privacy when it comes to workers' compensation").

A warrantless search that is conducted pursuant to an employee's consent may be valid under the Fourth Amendment. *Clemente v. Vaslo*, 679 F.3d 482, 489 (6th Cir. 2012); *see Feliciano v. Cleveland*, Nos. C85-3356, C86-4373, 1992 WL 59128, at \*5 (N.D. Ohio March 10, 1992). However, the employee's consent must have been provided voluntarily and not through duress or coercion. *Clemente v. Vaslo*, 679 F.3d at 489. Whether consent is provided voluntarily "is an issue of fact, to be decided by the Court[.]" *Feliciano v. Cleveland*, Nos. C85-3356, C86-4373, 1992 WL 59128, at \*13 (N.D. Ohio March 10, 1992), based upon a consideration of "'the totality of all the circumstances[.]'" *Clemente v. Vaslo*, 679 F.3d at 489 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041 (1973)). It is well established that "public employment cannot be conditioned upon waiver of constitutional rights[.]" *Feliciano v. Cleveland*, Nos. C85-3356, C86-4373, 1992 WL 59128, at \*12 (N.D. Ohio March 10, 1992); *see also Clemente v. Vaslo*, 679 F.3d at 492 ("public employees cannot be given a stark choice between asserting a constitutional right and keeping their jobs"). Thus, a public employee does not voluntarily consent to an otherwise unreasonable search if consenting to the search is a condition of continued employment. *Feliciano v. Cleveland*, Nos. C85-3356, C86-4373, 1992 WL 59128, at \*\*12-15 (N.D. Ohio March 10, 1992) ("several courts have held in the context of urinalysis that a public employer cannot force consent to an unreasonable search as a condition of employment"); *see also McDonnell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987) (citations omitted) ("[i]f a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment. A legal search conducted pursuant to voluntary consent is not unreasonable and does not violate the fourth amendment"). *But see Fontaine v. Clermont Cnty. Bd. of Comm'rs*, 633 F. Supp. 2d 530, 538 (S.D. Ohio 2007) (the court found the applicant for employment had consented to drug testing, but even if he had not, a Fourth Amendment violation did not occur under the circumstances). Notice of an employer's policy requiring a search and the employee's consent to that policy may be considered when evaluating the employee's reasonable expectation of privacy. *Palmer v. Cacioppo*, 429 Fed. Appx. 491, 498 (6th Cir. 2011); *Amer. Postal Workers Union, Columbus Area Local AFL-CIO v. U.S. Postal Serv.*, 871 F.2d 556, 560 (6th Cir. 1989); *accord Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987).

It is evident from the foregoing authorities that whether a board of county commissioners may require employees and their spouses to submit to testing for tobacco use as a condition of receiving

county health care insurance depends upon the nature and terms of the policy requiring the testing and the county's interest in conducting the testing. As we discussed in response to your first question, there is a causal relationship between the cost incurred by a county in providing health care insurance benefits and the use of tobacco by the persons who receive those benefits. A county's interest in reducing the costs associated with providing health care insurance benefits is significant. One way to reduce the county's financial burden is to require county employees and their spouses who use tobacco to pay a greater portion of the insurance premium. Testing employees and their spouses who receive county health care insurance for tobacco use provides information that is essential to a county's identification of those employees who should pay a greater portion of the insurance premium. Thus, a board of county commissioners may be able to demonstrate a connection between the county's interest in reducing its costs and requiring tobacco use testing.

However, we cannot predict whether an Ohio court would find that a county's policy requiring testing for tobacco use is supported by special needs that are sufficient enough to justify a departure from the Fourth Amendment's requirement for a warrant supported by probable cause or individualized suspicion. We also cannot predict how an Ohio court would weigh the county's interest in requiring the testing against the degree to which the testing intrudes on the privacy interests of the employees and their spouses, or whether a court would conclude that a person's consent to the testing is voluntarily provided when it is required by a board of county commissioners. Whether a county's tobacco use testing policy is constitutional must be answered by the courts and cannot be determined by a formal opinion of the Attorney General. *See* 2002 Op. Att'y Gen. No. 2002-032, at 2-210 n.1 ("the power to determine whether the enactments of a legislative body comply with the provisions of the United States Constitution or the Ohio Constitution rests exclusively with the judiciary ... such a determination cannot be made by means of a formal opinion of the Ohio Attorney General").

### **Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that a board of county commissioners that purchases group health care insurance for county employees and their spouses pursuant to R.C. 305.171 may set premium rates on the basis of the use of tobacco by a county employee or the employee's spouse. The board of county commissioners must have a reasonable basis for making that distinction and all similarly situated county personnel must pay the same insurance premium and receive equal benefits under the policy of group health care insurance.

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General