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## When Drug Testing May Be Permitted

Numerous states, including California, have passed drug testing laws. However, California is one of seven states whose constitutions also guarantee an individual's right to privacy.<sup>1</sup> This guarantee places additional restrictions on laws and regulations applying to alcohol and drug testing programs.

Although the courts have addressed the issue of drug testing, the right of private employers to test current employees for drugs and alcohol remains somewhat unsettled.

- Proposition 64 legalized adult recreational use of marijuana; however, employers may continue to maintain a drug and alcohol free workplace, including prohibitions on marijuana.

You may be permitted to conduct drug testing in five circumstances:

- During pre-employment screening
  - As part of a physical examination
  - Under reasonable suspicion
  - During post-accident testing
  - As a part of random testing. However, the legality of random drug tests, particularly in California, is extremely limited.
- Consult with legal counsel before implementing any alcohol or drug testing or screening programs.

Applicants or employees who currently use illegal drugs, marijuana or abuse alcohol are not protected under the state or federal laws protecting individuals with disabilities. Adopting and administering reasonable policies to prevent drug use, possession, or sale in the workplace does not violate the ADA or FEHA.

The following discusses each of these circumstances and the legal restrictions placed upon each type of testing.

This page contains the following information:

- [Pre-Employment Screening](#)
- [Routine Testing in Annual or Periodic Physical Examinations](#)
- [Random Drug Testing](#)
- [Reasonable Suspicion Testing](#)
- [Post-Accident Drug Testing](#)
- [Denying Benefits Due to Drug Testing](#)

## Pre-Employment Screening

As a condition of hiring, most employers can require an applicant to successfully pass a pre-employment drug test.<sup>2</sup> Suspicionless drug testing as a condition of hiring is valid when applied to all job applicants.<sup>3</sup>



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Pre-employment drug testing, including testing for marijuana, is still permitted in California. Employers may deny employment if a drug test comes back positive, even if the applicant was legally using marijuana under the state's Compassionate Use Act. Proposition 64, which legalized adult recreational use of marijuana, does not prohibit employers from continuing to test for marijuana use. However, it is a good idea to inform applicants in advance of a pre-employment drug test that marijuana will be tested and whether employment will be denied if the test comes back positive.

In *Loder v. City of Glendale*, the California Supreme Court addressed the issue of drug testing applicants and employees seeking promotions. In that case, applicants for employment as well as current employees seeking promotions were required to undergo urinalysis testing for drugs and alcohol. The court refused to allow the city to drug test current employees applying for promotions, but did allow testing of applicants.<sup>4</sup>

Suspicionless drug testing of applicants is valid even if the applicant delays submitting the test until after he/she starts work.<sup>5</sup>

Though suspicionless drug testing must take place before employment begins, in *Pilkington Barnes Hind v. Superior Court*, a California Court of Appeal held that post-employment suspicionless testing can be permitted in limited circumstances. The case involved an applicant who was offered a job on the condition that he pass a drug test. Due to the complications of relocating his family for the new job, the future employee on two separate occasions requested and was granted a delay in the date for which the test was scheduled. The employee was placed on payroll, spent a few hours filling out hiring paperwork and then took four days off to find a new home. When the employee finally took the drug test and tested positive for marijuana, the employer withdrew the offer of employment.

The employee sued, claiming that because he had been placed on the payroll, he was no longer an applicant and, therefore, could not be subjected to a suspicionless drug test. The Court of Appeal held that:

... a job applicant, who requests and receives a delay in submitting to the employment drug test... until after the start of employment, may not evade the employer's testing requirement post-employment on the ground the applicant thereby became an employee and is, consequently, immune from testing. In these circumstances, for purposes of suspicionless drug testing, the job applicant who caused the drug testing delay must submit to testing after the employment date. If the employee fails the test given in the brief period between employment and administration of the test, that employment, conditioned on passing the test which the employee delayed, may be terminated.

## **Routine Testing in Annual or Periodic Physical Examinations**

Although the issue is not yet determined in California, federal courts and some state courts have approved testing as part of annual or periodic physical examinations, particularly in union employment relationships governed by collective bargaining agreements. However, under the ADA and FEHA, the physical examination must be either part of a voluntary employee health program or job-related and consistent with business necessity.

- Employers may wish to seek advice of counsel prior to instituting such routine testing because California courts routinely protect privacy rights.



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If you choose to use drug testing in physical examinations, notify employees that drug and alcohol tests will be administered as part of the physical examination. Advise employees that you may take disciplinary action if they refuse to consent to a test. You can take disciplinary action if the employee refuses the test outright. However, under the California Confidentiality of Medical Information Act, you cannot take disciplinary action if the employee refuses to release any purely medical information obtained from the test.<sup>7</sup> You can only ask a physician's opinion about whether the employee is able to satisfactorily perform his/her job duties.

## Random Drug Testing

Random drug testing programs are those in which an employer informs employees that they may be required to submit to drug testing at any time during their employment for any reason or for no reason at all.

- Although random drug testing may be the most effective program to detect and deter drug or alcohol use, the legality of random drug testing, particularly in California, is extremely limited.

Cases upholding random drug testing are limited to those involving employees in the following situations:

- Employees in specific, narrowly defined job classifications
- Employees in professions that can be categorized as part of a pervasively regulated industry, where the employee has less expectation of privacy given the nature of employment
- Employees in positions that are critical to public safety or the protection of life, property or national security

For example, random testing has been upheld for truck drivers under the FHWA regulations, aviation personnel, and correctional officers having contact with prisoners.

Further, according to the American Professional Captain's Association, "a random test program is required for all licensed officers on vessels that require a license to operate. It also includes all crew members working on those boats requiring a licensed officer. Because the pre-employment test is given with notice, it does not replace the need for a random program. However, a random program, if already in place, can be used in lieu of an employment test."

With these exceptions, random drug testing is not allowed in California. In *Luck v. Southern Pacific Transportation Co.*, the court held that any intrusion into an individual's privacy must be justified by a compelling interest. The court found that the employer's concern about deterrence, efficiency, competency, a drug-free environment, rule enforcement and ensuring public confidence in the railway system were not compelling interests. Moreover, the court held that safety was not a compelling reason for testing the employee involved — a computer operator for a railroad who was not in a safety-sensitive position — and that her termination for refusing to consent to the test breached the covenant of good faith and fair dealing.

In another California Supreme Court case, *Hill v. NCAA*, the court considered the privacy rights of college athletes being randomly tested for drugs by an intercollegiate athletic association. In a statement that sheds some light on the right of private employers to randomly drug test, the court stated:



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We intimate no views about the legality of blanket or random drug testing conducted by employers, whether of current employees or applicants for employment, or by other kinds of entities. Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily conditions, physical training, and extracurricular competition inherent in athletics.

Based on this case, it is extremely risky to randomly test employees for drug use except in the unique circumstance in which an employee's expectation of privacy might reasonably be diminished. You must now show that the invasion of privacy is justified because it substantially furthers one or more legitimate and important interests outweighing the employee's privacy interest.

However, in California, random drug testing for security or safety positions may be allowed if the employee's privacy interests are outweighed by the employer's safety interests, including the employer's interest in reducing risk of injury to co-workers. In *Smith v. Fresno Irrigation District*, the court found that a construction and maintenance worker's duties were safety-sensitive because he operated power tools and heavy equipment in close proximity to co-workers and as part of a team performing dangerous work. Advanced notice of the drug test will also decrease the expectation of privacy.

## Reasonable Suspicion Testing

Courts are generally supportive of requiring drug or alcohol testing based on specific objective facts indicating abuse — often called "reasonable suspicion."

"Reasonable suspicion" has been defined by one court as something less than probable cause but more than mere suspicion. Reasonable suspicion requires further investigation and is based on facts and observations. Specific objective facts and rational inferences drawn from those facts must justify reasonable suspicion. Evidence sufficient to justify reasonable suspicion need not rise to the level of full probable cause. Evidence can include alcohol on the breath, lapses in performance, inability to appropriately respond to questions and physical symptoms of alcohol or drug influence.

The constitutionality of a drug test under the California Constitution is evaluated by balancing the employee's reasonable expectation of privacy against the employer's legitimate interests in imposing the test. If a drug test is not triggered by a reasonable belief that the employee is under the influence of drugs or alcohol, the employee can have a stronger reason to expect to maintain his/her privacy and you may have less of a need to demand the test.

In *Kraslawsky v. Upper Deck, Inc.*, an employer lost its motion for summary judgment after the employee, a former secretary, demonstrated that there was a factual dispute over whether her employer had reason to believe she was impaired, and that the supervisors who requested the test bore her some personal animosity that could have affected the decision. Nonetheless, the court found the existence of reasonable cause was relevant to determining the constitutionality of defendant's drug test demand. Without requiring an employer to exhibit reasonable cause for imposing the test, an employer with a valid drug testing policy would have free license to conduct random testing at any time.

The employee's declarations that she never used drugs, that she did not appear intoxicated and the suggestion that the employer wanted to fire the employee created a factual issue as whether the employer had reasonable cause to give plaintiff a drug test. The employee did not consent to a



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random drug test, and plaintiff's submission to an employment drug test did not eliminate her reasonable expectations of privacy in relation to a random drug test.

## Post-Accident Drug Testing

Courts have generally upheld post-accident drug testing where an employer has reasonable suspicion that an employee involved in the accident was under the influence of drugs and/or alcohol or if the accident was a serious one. Consistent with that concept, the U.S. Supreme Court upheld the Federal Railroad Association's post-accident drug testing regulations even though the regulations did not require individual suspicion of drug use.

The federal Occupational Safety and Health Administration's (federal OSHA) final rule relating to the tracking and reporting of workplace injuries also includes a prohibition on post-incident drug testing if the testing is retaliatory. This rule may affect employer policies that automatically require post-accident drug testing. Federal OSHA has given states that operate their own safety and health programs, such as California, extra time to implement the requirements. Until Cal/OSHA implements the federal changes here in California, Cal/OSHA will not enforce the federal rules. Cal/OSHA had not issued regulations on this matter.

## Denying Benefits Due to Drug Testing

In *Ables v. Shultz Steel Co.*, the California Unemployment Insurance (UI) Appeals Board ruled that positive drug tests can disqualify discharged workers from receiving unemployment compensation, if employees agree to the tests and the tests are scientifically accurate. The Board said that every employer and employee has a vital interest in its workplace being drug free. The Board added that it is the right of an employer or other employees to create and maintain a workplace free of illegal drugs.

The Board ruled that for purposes of the UI law, drug tests were permissible when employers have reasonable suspicion that an employee in an inherently dangerous occupation is impaired.

Employees can also be disqualified from receiving workers' compensation benefits based on drug test results. Under workers' compensation laws, you are not liable for injuries that employees sustain while on the job, nor for the death of any employee if the injury or death was caused by alcohol intoxication or the unlawful use of a controlled substance.