



In-Depth Discussion | July 19, 2017

## **DEAR LITTLER: A POTENTIAL NEW HIRE SHAVED HIS HEAD AFTER LEARNING ABOUT OUR DRUG-TESTING POLICY. NOW WHAT?**

By: Nancy Delougu

**Dear Littler:** We recently offered a position to a candidate at one of our retail locations. He had a reasonable amount of head hair at the time we offered the job. After learning that we require hair testing both for new hires, and for random screenings thereafter, he told us that he doesn't have hair any more, and he probably won't once he starts working. He insists that he cannot provide a hair sample for testing purposes. What do we do now?

*-Stunned in San Francisco*

### **Dear Stunned,**

While it might seem outrageous, your "hairy situation" is not particularly unusual. Your decision will turn on several factors, including whether you still wish to hire him and whether your workplace drug-testing policy addresses such a situation. The Americans with Disabilities Act (ADA) could tangle the dilemma further, depending on the candidate's reasons for claiming that he cannot undergo hair testing. Finally, state law may also affect your position on drug testing, particularly if this prospective employee would work within California.

### **Options for Testing**

Assuming this candidate has no medical reason for removing his visible hair, you could call out his hare-brained scheme for what it is: a refusal to test. Such a refusal constitutes grounds for you to withdraw the conditional offer of employment. This approach might be particularly appropriate, for example, if your company strictly and consistently enforces the drug-testing policy with all current and prospective employees.

Your company presumably selected hair testing because it provides the most thorough information about a candidate's recent drug use. Drug molecules, like other chemicals, are incorporated into the hair as it grows and remain in each strand of hair for the life of the strand. Based on the growth rate for head hair, the "look back" period for typical hair testing is approximately 90 days—far longer than a test analyzing urine or oral fluid samples. You may be able to collect hair for a sample from underarm or chest hair, if he is willing. This hair grows more slowly but can be used for drug-testing purposes – consult your testing provider with any questions you may have.

If he asserts, or if you know, that he does not have any useful hair samples to provide right now – let's say he is a competitive swimmer or a body-builder who commonly removes visible body hair – you could offer to utilize a different test sample. For example, you could agree to accept a pre-hire urine drug test, but instruct him that future follow-up and/or random testing under your employer's policy will require hair samples, or that he will be subject to more frequent testing than his peers if he cannot produce a hair specimen in the future. Bear in mind that, even if he agrees to this resolution, urine testing can detect only casual drug use for only 24 to 72 hours after the use. (The "look back" period for chronic users of marijuana may be longer, up to a month.) Additionally, urine testing is readily subject to tampering through the use of devices and processes that can be utilized to manipulate the results, such as synthetic urine and various detox or dilution products. You also might propose the use of oral fluids tests, which are easily administered and use an observed collection, minimizing the potential for tampering, but that offer a narrow "look back" period. In short, there are different avenues if you voluntarily choose to accommodate the prospective employee. Offering these options does, however, require additional time and effort to administer your policy, of course.

### **Reasonable Accommodation Obligation**

In evaluating your options, however, be sure to assess whether your organization might have a legal obligation to accommodate this individual. If the candidate informs you (or you already suspect) that he has a medical condition affecting hair production or loss, an ongoing reasonable accommodation of his inability to provide a hair sample for testing may be required by the ADA or similar local laws. In that event, you may need to consider other methods of testing, so long as the methods are viable under relevant state law and do not pose an undue hardship to your organization. Many, but not all, collection sites offer alternative specimen collection services, and these samples can be sent to a qualified laboratory for testing and medical review as your policy most likely requires. Contact your test provider to discuss options.

### **State Laws Restricting Random Testing**

Finally, a word of caution about your organization's suspicionless testing policy. Employers must be mindful of the drug-testing laws in each jurisdiction where they operate.

Your question did not indicate where this potential employee would work. But in the event that he, too, is located in California, you should be cognizant of the limitations that California places on random drug testing.

The California constitution expressly guarantees an individual's right to privacy.<sup>1</sup> Over the years, California state courts have addressed the interplay between that right to privacy and the use of drug testing for employment purposes. These courts have sought to balance the intrusiveness of testing and the necessity for it.<sup>2</sup> As the courts have explained, this balancing involves numerous factors, including but not limited to: (1) a consideration of the status of the person being tested (*i.e.*, applicant or existing employee); (2) the type of job at issue (*i.e.*, whether it is safety sensitive); and (3) the testing procedure

<sup>1</sup> Cal. Const. art. I, § 1.

<sup>2</sup> See, e.g., *Loder v. City of Glendale*, 59 Cal. Rptr. 2d 696, 729 (Cal. 1997); *Hill v. Nat'l Collegiate Athletic Ass'n*, 26 Cal. Rptr. 2d 834 (Cal. 1994).

being used (*i.e.*, whether urine is being collected, blood is being drawn, pupillary reaction is being tested, etc.).<sup>3</sup> Consistent with these factors, preemployment screenings are generally permitted in California, but random testing of current employees is permitted only when the employer's need to ensure the individual is drug-free outweighs the workers' reasonable expectations of privacy. Suspicionless testing is therefore likely to be approved only for employees working in safety-sensitive or security-sensitive positions, whose expectations of privacy are outweighed by the employer's need to ensure a drug-free workplace. If this candidate's retail position is neither safety-sensitive nor security-sensitive, requiring him to submit to random drug testing while employed in California would be risky. Of course, you would retain the right to conduct reasonable suspicion testing if you had reason to believe he was violating your drug-free workplace policy once hired.

To the extent that this candidate may work in San Francisco, your employer must also comply with the San Francisco Drug Testing Ordinance.<sup>4</sup> This ordinance does not restrict the testing of applicants. On the other hand, it prohibits, under nearly all circumstances, the random or company-wide testing of current employees, using blood, urine, or encephalographic testing. While you could permit the candidate to conduct his preemployment screening with a urine sample, the San Francisco law prohibits most other types of urine testing, so any additional testing you wished to conduct would have to utilize a sample other than urine.

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<sup>3</sup> See *American Fed. of Labor v. Unemployment Ins. Appeals Bd.*, 28 Cal. Rptr. 2d 210 (Cal. Ct. App. 1994) (California Court of Appeal held that an employee who refused to submit to a drug test was discharged for misconduct and, therefore, was ineligible for unemployment insurance benefits); but see *Kraslawsky v. Upper Deck*, 65 Cal. Rptr. 2d 297 (Cal. Ct. App. 1997) (court rejected the employer's contention that the secretary's privacy claim lacked merit because the fact that the secretary had been tested prior to being hired precluded her from having a "reasonable expectation" that she would not be tested once employed).

<sup>4</sup> S.F., Cal., Police Code art. 33A, § 3300A.5.