

SUBSTANCE ABUSE

Trends in Employee Drug Testing

BY NANCY N. DELOGU

For years savvy lawyers cautioned California employers against adopting employee drug and alcohol testing programs. The law is too uncertain, they warned. Better to avoid drug testing. Elsewhere, testing burgeoned throughout the 1990s, particularly after the U.S. Department of Transportation issued regulations requiring it for more than 8 million private-sector transportation employees.

Today, however, California law controlling drug testing is more certain and predictable than it has ever been. And while the legal community was debating the issue, many California employers quietly implemented substance-abuse prevention programs that include a range of drug and alcohol testing provisions.

Given the state's history of protecting individual privacy and hostility toward employee drug-testing programs, many attorneys may be surprised to learn of developments that will assist them in advising employers and employees of their rights.

APPLICABLE LAW

Substance-abuse testing is governed almost exclusively by state law. And unfortunately, no single corporate drug and alcohol testing policy will satisfy all state laws. Businesses with multistate operations, therefore, must plan especially carefully before adopting a substance-abuse policy.

In addition, the federal Americans with Disabilities Act (ADA) and the Family and Medical Leave Act may also play roles in addressing the needs of individual employees who experience substance-abuse problems. However, current users of illegal drugs are not considered disabled, and alcoholics can be held to the same standards of performance and behavior that the employer expects of all employees. At base, drug testing is a state law issue, with some embellishments. San Francisco, for example, has adopted an ordinance that further regulates and limits drug testing of job applicants and employees working within city limits. (See San Francisco Police Code, art. 33A.)

PRIVACY PROTECTIONS

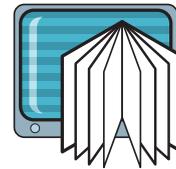
In California, employee drug-testing programs are regulated primarily by the privacy provision of the state constitution.

Unlike most constitutional provisions, California's privacy protection extends not only to the activities of government but also to private employers. Drug and alcohol testing programs clearly implicate individual privacy rights for both public and private employees. (See *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994).) This does not mean that testing is unlawful, however.

A BALANCING TEST

To determine whether a particular test is reasonable, the California Supreme Court has ruled that an employer's justification for substance-abuse testing must be weighed against an employee's or applicant's right to privacy. (See *Loder v. City of Glendale*, 14 Cal. 4th 846 at 897-98 (1997).) To legally gather private information—such as whether an individual has recently used alcohol or an illegal drug—a private employer must be able to articulate a “competing” beneficial interest or important need for the test that justifies the intrusion on the individual. Public-sector employers, in contrast, typically must articulate a “compelling” interest to justify the “search” under the Fourth Amendment to the U.S. Constitution.

Nevertheless, following *Hill* and *Loder*, state courts have applied the balancing equation in a variety of employment testing cases. These decisions, in turn, offer guidance to practitioners seeking to develop lawful testing policies.



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SPECIAL CREDIT

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PREHIRE TESTING

The validity of prehire testing absent an accompanying medical examination was challenged in *Pilkington Barnes Hind v. Superior Court*. In that case, an applicant was extended an offer of employment, contingent upon taking and passing a drug test. He asked the employer if he could postpone the test until he had moved to the new job location, and the employer agreed. After he arrived, he signed new-hire paperwork, submitted a sample for testing, and left to begin hunting for a residence. When the test was confirmed positive for marijuana, the employer withdrew the employment offer. The man sued, alleging that the test was an unlawful invasion of his privacy; he also claimed he was an employee, not a job applicant, because the employer allowed him to take the test after he began working. (66 Cal. App. 4th 28 (1998).)

The California court of appeal disagreed with both premises. First, echoing the *Loder* decision, it held that a job applicant typically has a reduced expectation of privacy as compared with a current employee; applicants essentially reach out to prospective employers and expect to answer questions about their suitability for a particular job.

The court ruled that the employer had a worthy competing interest in evaluating the applicant, who had not performed any substantive work before the test was conducted. The employer therefore had an insufficient opportunity to observe him long enough to determine whether he appeared to have performance or behavior problems that might be related to substance abuse. Significantly, the appellate panel also rejected, with stinging language, the applicant's suggestion that he had a right to engage in illegal activity while away from work, stating that: "Smoking marijuana is not . . . a matter of constitutional privilege." (66 Cal. App. 4th at 33.)

REASONABLE SUSPICION

Reasonable-suspicion testing was also implicitly accepted as the proper standard in *Kraslawsky v. Upper Deck, Inc.* (56 Cal. App. 4th 179 (1997).)

However, the employer lost its motion for summary judgment after the plaintiff, a former secretary, demonstrated 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.

Absent reasonable suspicion, the plaintiff argued, a request for a test amounted to an unlawful request that she submit to random testing, because it intruded upon her reasonable expectations of privacy. In other words, while a testing program may be lawful on paper, it is subject to challenge if enforced other than as written. (56 Cal. App. 4th at 188–89.)

RANDOM TESTING

For many years lawyers reading the *Hill* and *Loder* decisions were unsure whether random or suspicionless drug tests were legal in California. In 1999, however, the court of appeal issued another decision, *Smith v. Fresno Irrigation District*, which upheld the employer's random drug-testing program for employees who perform safety-sensitive work. (72 Cal. App. 4th 147 (1999).)

Fresno Irrigation does not suggest a formula or mechanism for determining what sort of work, and how much of it, will qualify an individual as holding a safety-sensitive position. However, the court pointedly rejected the employee's contention that only individuals who worked in positions affecting public safety could be subjected to random testing. It is enough, the court held, that the employee worked in a position in which an impairment could pose a real threat to himself or his coworkers.

Moreover, the court rejected the idea that random testing was inherently unfair, noting that unlike reasonable-suspicion tests, which could be abused by supervisors holding grudges, random tests are generally triggered by a computer program and less likely to be abused. (72 Cal. App. 4th at 163–64.)

Like random drug tests, suspicionless alcohol tests are permitted only for

employees and applicants who hold or are seeking jobs with special safety concerns or entailing other justification. This is true nationwide, not only in California. The reason is that alcohol tests are considered medical examinations under the ADA, while drug tests are specifically exempt from the definition of what composes a medical exam. (See 42 U.S.C. § 12114(d).) Like all medical examinations, alcohol tests can be conducted only in certain circumstances and used only in a manner that is both job-related and consistent with business necessity. (42 U.S.C. § 12112(4)(A).)

The *Irrigation District* case remains the only California decision on random drug testing since *Hill* and *Loder* were decided. Nearly a decade has passed, and in the interim a significant number of California employers have implemented random-testing programs for their employees in safety-sensitive jobs.

TESTING-PROGRAM REQUIREMENTS

The *Irrigation District* decision did provide useful guidance to those who seek to ensure that substance-abuse testing programs will pass muster in the state. The court emphasized that the employer had taken steps to reduce both its employees' expectation of privacy and the intrusiveness of the procedure.

For example, the employer had developed a written substance-abuse and testing policy and distributed it to all affected employees well in advance of commencing testing. In addition, it sponsored an information session that allowed employees to ask about the policy and how it would be implemented. Employees were encouraged to seek any needed assistance before testing began.

Typically, lawful drug-testing policies must ensure that all initial positive tests are confirmed using a sensitive and accurate methodology, to eliminate the possibility of false positive results. Employees who test positive are offered an opportunity to speak, in confidence, with a medical professional before the results are sent to the employer. If the results can be explained by the legal use of any substance, the medical

professional reports the test as negative to the employer.

In the *Irrigation District* case, the court found that the employer's decision to distribute a written policy detailing what was expected in terms of employee behavior as well as the measures used in conducting testing had the effect of reducing employees' expectation of privacy. (72 Cal. App. 4th 147 at 162.) Moreover, by ensuring that the testing methods used were only as intrusive as necessary to obtain a valid test sample and result—yet effective enough to detect and deter drug use by virtue of being unannounced—the employer mitigated the actual intrusiveness of the testing. In the balance, all of these measures weighed in its favor.

FAILING A TEST

An employer is under no obligation to hire or retain individuals who fail or refuse to submit to a drug test—including by tampering with or adulterating the test sample. And, although California Labor Code section 1025 encourages employers with more than 25 employees to “accommodate” individuals seeking time off to pursue rehabilitation, that law does not provide employees with substantive rights beyond those they may have under state and federal laws providing medical leaves. (See *Sullivan v. Delta Airlines, Inc.*, 58 Cal. App. 4th 938 (1997).)

Employees who come forward seeking assistance voluntarily should be accommodated, if possible. But if an employee offers to seek assistance only because he or she has been caught violating the substance-abuse policy by a test or other means, the employer is under no obligation to offer rehabilitation.

This is not to say that the employer should not offer employees an opportunity to seek rehabilitation, either before or after the employee admits a need for assistance, if so inclined. Doing so helps retain valuable workers, creates good will, and is often cost effective. If an employer elects to offer a second chance to someone who has violated its policy, it must be careful to ensure that it complies not only with applicable medical leave laws but also with the ADA and the California

Fair Employment and Housing Act protections for recovering drug users.

UNANSWERED QUESTIONS

The law on drug testing in California, therefore, is both more settled and more supportive of substance-abuse testing programs than many attorneys may realize. However, unanswered questions remain.

Surprisingly, not a single reported California decision addresses testing for substance abuse after an accident has occurred. Postaccident tests would appear to fall somewhere between reasonable suspicion tests—in which the employer has reason to suspect a

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current violation of its drug and alcohol rules, and thus is justified in intruding upon the individual's privacy—and random drug testing, which is by definition suspicionless, and so can be justified only by the employer's heightened need to ensure workplace safety or security. The trigger for a postaccident test therefore is relevant.

Tests required only of individuals whose acts have caused or contributed to the accident may be justified as a necessary component of the employer's investigation into its cause; ideally the results provide information that can be used to help prevent future accidents. Tests required following any report of a workplace injury appear to be the legal equivalent of random tests, and thus subject

to challenge unless the employer can articulate some additional justification.

Also, if prehire tests are justified because the employer has not had the opportunity to observe the individual at work, what about tests for applicants who have been working for the prospective employer as independent contractors or in a “temp-to-perm” role? Presumably the candidates for those positions are well regarded by their employers and such tests would qualify as suspicionless, and therefore unlawful.

TESTING METHODS AND TAMPERING

The evolution of the science of drug and alcohol testing may also affect what types of testing programs will be considered reasonable in the future. For example, is the availability of breath-testing technology to conduct alcohol tests so common and widespread that drawing blood for alcohol tests will be considered unnecessarily intrusive?

Also, a wide array of products sold via the Internet are designed to help individuals “pass” their urine-based drug tests. These products typically involve consuming substances that are supposed to cleanse the individual's body sufficiently to deliver a negative test result, or the use of devices that allow an individual to substitute someone else's urine for his or her own without detection. This practice came to light when Minnesota Vikings running back Onterio Smith made headlines in 2005 after airport security officials discovered a product called the “Whizzinator,” a lifelike prosthesis designed to mimic male anatomy for the purpose of taking drug tests, along with powdered urine, in his luggage.

May an employer that suspects tampering with a test sample conduct “observed” urine collections, as the U.S. Department of Transportation requires for regulated employees? If the employee is not subject to those regulations, which preempt inconsistent state laws, then California law would apply and the employer might be challenged to demonstrate why a different test method—such as a hair or saliva test—would not be equally effective and less intrusive. **CL**

Trends in Employee Drug Testing

1. It is legal to conduct employee drug testing in California.
 True False
2. The law on drug testing of public employees differs from the law governing drug testing of private employees.
 True False
3. Preemployment drug testing is permitted in the absence of a corresponding physical examination.
 True False
4. An employer can take disciplinary action against an employee who uses illegal drugs off the job or while away from the workplace.
 True False
5. From a legal perspective, alcohol tests are just like drug tests.
 True False
6. Random drug testing is illegal in California.
 True False
7. An employer must provide an individual who has violated its substance-abuse policy with the opportunity to pursue rehabilitation in lieu of discipline.
 True False
8. Drug addicts and alcoholics may have rights to protection under the federal Family and Medical Leave Act and California's medical leave laws.
 True False
9. Intrusive or ineffective testing methods may undermine the integrity of an employer's drug-testing program.
 True False
10. To lawfully conduct drug testing of current employees, a private employer in California must be able to point to a compelling interest that justifies invading their privacy.
 True False
11. A substance-abuse policy that complies with the strict requirements of California law can be implemented nationwide.
 True False
12. An employer must offer to reasonably accommodate an alcoholic employee, even if that means that the employee misses work or must be sent home after arriving at work intoxicated.
 True False
13. Employers in both the public and private sectors must comply with the state constitution's privacy provision.
 True False
14. Job applicants have fewer privacy rights than employees.
 True False
15. An individual's right to use marijuana is constitutionally protected.
 True False
16. Reasonable-suspicion testing is lawful in California.
 True False
17. It is important to know whether an employee works in a job that can be described as safety-sensitive in determining whether he or she can be subjected to drug or alcohol testing.
 True False
18. Random drug tests are permitted only for employees working in positions in which they owe a responsibility to ensure public safety.
 True False
19. Drug and alcohol tests are considered medical examinations under the Americans with Disabilities Act.
 True False
20. Distributing a written drug-testing policy in advance of testing diminishes an employee's expectation of privacy.
 True False

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