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Hiring Guidelines and Pitfalls

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§1.65 H. Drug Tests Permissible

In *Loder v City of Glendale* (1997) 14 C4th 846, the California Supreme Court confirmed that a government employer may require job applicants to undergo a drug test, as long as that test is part of a broader pre-employment medical examination that is required of every applicant. The court held that such a test does not violate the privacy clause of the California Constitution (Cal Const art I, §1). Accordingly, *Loder* should also allow private employers to test job applicants for drugs as part of a pre-employment medical examination. Indeed, the *Loder* holding was applied to a private employer in *Pilkington Barnes Hind v Superior Court* (1998) 66 CA4th 28. In that case, the court deemed the employee a job applicant even though the drug test was administered after he started employment, because the test was delayed through no fault of the employer and the employee's employment was conditioned on his passing the test. See also *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920 (no disability discrimination under FEHA when private employer refused to hire applicant because of drug test result that revealed applicant used marijuana, even though applicant's physician recommended applicant use marijuana to treat chronic pain as permitted by Compassionate Use Act of 1996 (Health & S C §11362.5)).

In *Wilkinson v Times Mirror Corp.* (1989) 215 CA3d 1034, the court held that defendant's policy of requiring testing as a condition of employment was reasonable in light of provisions for prior notice and consent, procedural safeguards, and minimal intrusiveness. The "reasonable" test involves a balancing of the applicants' privacy interests against the employer's need for the test. The court noted that a major factor in its analysis was the lesser expectation of privacy by job applicants as opposed to current employees. 215 CA3d at 1048.

The United States Supreme Court also upheld a drug testing program of the Customs Service, requiring urine samples from candidates for positions involving the enforcement of drug-related laws or the

carrying of firearms. *National Treasury Employees Union v Von Raab* (1989) 489 US 656, 109 S Ct 1384.

NOTE► Unlike medical testing, testing for illegal use of drugs is *not* subject to restrictions under the ADA. 42 USC §12114(d).

No matter how carefully an employer has crafted its drug testing policy, challenges can be expected unless the intrusiveness of test-taking procedures is minimized. For example, the employer should not require a test subject to provide a urine sample while under direct supervision. See *Hansen v California Dep't of Corrections* (ND Cal 1996) 920 F Supp 1480 (urine test under direct observation violates California Constitution's right to privacy); *Tucker v Dickey* (WD Wis 1985) 613 F Supp 1124, 1129 (manner of conducting urine test unreasonable under Fourth Amendment).

The most likely claim arising from a drug test is one alleging that the applicant or employee was the victim of an unconstitutional search or of invasion of privacy. Other potential claims that may be asserted against an employer for wrongful testing include intentional infliction of emotional distress, defamation, violation of the ADA if the employee is a recovering abuser, and wrongful termination if the employee is discharged as a result of the test.

The potential for inaccuracies in the testing process, combined with the potential harm that may result from allegations of substance abuse, make these issues of particular concern. Because drug screening tests may be challenged as unreliable, a second confirming test should be conducted when a sample shows the presence of drugs.

To help defend against employee claims, employers should obtain written consent before testing for drugs. Although a consent may be challenged as obtained under duress, it provides the employer with at least some evidence that it had the employee's approval. Also, a consent can specify the consequences to the employee if he or she does not consent.

For further discussion of drug testing issues, see §§13.59–13.69.



For further discussion, see [Advising California Employers and Employees: Hiring Guidelines and Pitfalls](#), chapter 1 (Cal CEB). Available in print and through [OnLaw](#).

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- Hiring guidelines and employment contracts
- Wages and hours; family and medical leave
- Employee handbooks
- Privacy issues in the workplace
- Wrongful termination; reductions in force