September 13, 2022

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| **VIA ELECTRONIC MAIL ONLY**  {{ text\_recipient\_first\_name }} {{ text\_recipient\_last\_name }}  {{ text\_company\_legal\_name }}  {{ text\_company\_address|street }}  {{ text\_company\_address|city\_state\_zip }}  *{{ text\_recipient\_email\_address }}* |  |

Re: *Drug Testing Job Applicants and Employees*

Dear {{ text\_recipient\_first\_name }},

Many employers in California, like {{ text\_company\_legal\_name }} (“{{ text\_company\_short\_name }}”), have either already instituted drug testing policies at their companies, or wish to do so. The problem, however, is that many of them are instituting such policies without any understanding of what the law *does* and *doesn’t* allow. And because drug testing implicates the constitutional privacy rights of all employees, employers who do things incorrectly are needlessly subjecting themselves and their businesses to significant legal liability.

You’re getting this letter because {{ text\_company\_short\_name }} wishes to conduct drug testing on yn\_drug\_testing\_applicants != "No" and yn\_drug\_testing\_random != "No" both individuals applying for employment with {{ text\_company\_short\_name }}, as well as its current employees.###yn\_drug\_testing\_applicants != "No" and yn\_drug\_testing\_random != "Yes" individuals applying for employment with {{ text\_company\_short\_name }}.###yn\_drug\_testing\_applicants != "Yes" and yn\_drug\_testing\_random != "No" its current employees.###yn\_drug\_testing\_applicants == "No" and yn\_drug\_testing\_random == "No" individuals applying for employment with {{ text\_company\_short\_name }} and/or its current employees.### Please, therefore, be sure to read this letter carefully before {{ text\_company\_short\_name }} starts using the accompanying Drug Testing Consent Form that I prepared on {{ text\_company\_short\_name|possessive }} behalf.

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**Private Sector Employers and the CDFWA**

Surprisingly, there is very little statutory law relevant to the subject of *private sector employers* (like {{ text\_company\_short\_name }}) conducting drug testing on their *private sector employees*. It’s true that the California Drug-Free Workplace Act of 1990 (“CDFWA”) applies to private sector employers—but only to the extent that such a company’s employees are actually working on a project awarded by an agency of the State of California. And in such cases, the CDFWA requires employers to: (i) certify that they will provide a drug-free workplace for their employees; (ii) notify employees that they cannot, as a condition of employment, engage in *illegal* drug use; and (iii) establish a drug-free awareness program for their employees.

**The Absence of State-Wide Statutory Law**

The CDFWA, therefore, does not regulate (i.e., apply to) employee drug testing in the *private sector* where no public contracts are at issue. In other words, the CDFWA does not apply to the vast majority of employers in California’s private sector. That is not, however, the end of the analysis. Although some city ordinances in California (e.g., San Francisco and Berkeley) regulate drug testing by employers, the State of California as a whole has no statute or regulation governing drug testing of employees (or job applicants) by private sector employers operating in California. Instead, the legality of non-CDFWA applicable workplace drug testing is determined on a *case-by-case* basis *by the courts* in California. In other words, there is no bright-line rule or statute dictating when drug testing is allowed or prohibited in all circumstances.

Consequently, the parameters of workplace drug testing have been developed by case law, with the courts applying a balancing test weighing an individual’s right to privacy under Article 1, Section 1 of the California Constitution against an employer’s need to conduct a drug test.[[1]](#footnote-1) In determining the legality of such drug testing, courts in California consider several factors, including: (i) the nature of the test; (ii) the equipment used; (iii) the manner of administration;[[2]](#footnote-2) and (iv) the reliability of the test.

Before delving into a summary of the relevant legal issues, I do want to raise the issue of marijuana because unlike other drugs that we tend to think of when we talk about “illegal drug use,” marijuana in California is now legal. A lot confusion exists because despite California’s legalization of marijuana, its use and possession are still illegal under *federal* law. California courts, however, have addressed that confusion by consistently holding that employers *may* discipline employees who test positive for marijuana use even if the employee has a prescription for medical marijuana or is otherwise in compliance with California law.yn\_prohibit\_pot != "No" [[3]](#footnote-3) ###

With preliminary issues out of the way, let’s discuss the issues surrounding drug testing by employers in California.

**Performing Drug Tests on Job Applicants**

As I explain more fully below, when discussing the balancing tests associated with determining the legality of drug testing employees/applicants, the courts give employers the most leeway when it comes to testing job *applicants*. In other words, unless your particular city (e.g., San Francisco) has a wholesale ban on drug testing job applicants, it’s almost universally permissible to condition a job applicant’s employment on passing a properly administered drug test—*provided that the employer obtains the applicant’s informed consent* (which, fortunately, the Drug Testing Consent Form that I prepared for {{ text\_company\_short\_name }} happens to do).

**Performing Drug Tests on Current Employees**

The issue of testing current employees is a bit more difficult and requires employers to tread more carefully. This is so because drug testing of current employees (as opposed to job applicants) is subject to more stringent analysis by the courts than pre-employment drug testing. The two most common scenarios involving testing of a company’s current employees involve either: (i) the testing of an employee after a suspicious incident (or following behavior indicative of being under the influence); or (ii) random testing.

Testing After an Incident / Following Strange Behavior

In general, an employer who wants to test an existing employee must identify compelling reasons why either: (i) its interests in drug testing would be elevated; or (ii) the employee’s expectation of privacy would be reduced. One relevant, but not necessarily determinative, inquiry is whether the employer has a reasonable belief that an employee is intoxicated or high, which would strengthen the argument in support of the employer’s right to test an employee. Generally speaking, an employer can meet this test under two sets of circumstances.

If an employer could show that at least two management-level employees (e.g., not mere supervisors) witnessed behavior consistent with being under the influence, a mandatory drug test would have a decent chance of being upheld by the court.[[4]](#footnote-4) So too would a drug test following an incident that, by its nature, implies being under the influence (e.g., a forklift driver drives into another vehicle or a wall).

In short, while testing on job applicants is almost universally permissible, testing on employees requires something more on the part of the employer, such as when an employee demonstrates certain behavior or following a suspicious incident.

Random Drug Testing

With respect to *random* drug testing, the threshold for employers is even higher. Unfortunately, courts in California have not been too helpful in this arena, and the California Supreme Court has yet to decide the appropriateness of such random testing of existing employees. The best that I can do, therefore, is provide a few examples of what the courts have previously allowed and prohibited in specific cases:

— Random drug testing may be permissible in limited circumstances, such as where the employee is in a *safety[[5]](#footnote-5) or security-sensitive* position. In such cases, drug testing is most likely permissible when the employees operate in a field where injury to themselves or others is reasonably foreseeable, *such as construction or security-related work.*

— Some courts have determined that random drug testing will likely be deemed permissible if the employer gives the employees at least a 30-day notice of the test, including information explaining the substance abuse testing procedure. In such cases, however, while such an announcement would certainly diminish the randomness of the “random drug test,” it is also true that many drugs you might want to test for can be detected by certain tests beyond 30 days.

— Likewise, generally when an employee is applying for a promotion, drug testing based on *no* suspicion of drug or alcohol use is impermissible, but it is possible that there are jobs or categories of jobs for which such a test would be appropriate *even in the absence of such “suspicion.”* What those jobs are is a subject that we can discuss more specifically if and when the time arrives.

**Drug Testing Protocols**

Once an employer overcomes the hurdle of *when* drug testing is permissible, the employer must still conduct the drug testing in a manner designed to protect the employee’s privacy rights. Remember, there are two parts to the balancing test that courts rely upon. This issue relates to the second part.

Generally

Again, California law provides no specific requirements regarding drug testing protocols in the *private sector* (*unlik*e in the public sector, such as testing for state employees/applicants, where the testing must be conducted by a licensed physician in a certified commercial laboratory, etc.). As with drug testing in general, courts tend to look at the manner in which the drug tests are conducted, and from there they perform a completely separate “balancing test,” where they weigh an individual’s protected privacy rights against an employer’s legitimate interests. California courts, for example, have determined as follows:

— Visually monitoring a person providing a urine sample (e.g., watching someone urinate) constitutes a serious invasion of that person’s privacy.

— Indirect monitoring of the urine collection process represents a negligible intrusion into an employee’s privacy.

— However, “non-visual monitoring” (e.g., a nurse listening for urination sounds outside the toilet area) *might* be sufficiently intrusive as to amount to an unconstitutional invasion of privacy.

Given the degree of ambiguity in this arena, I opted to require mandatory use of a certified laboratory in the Drug Testing Consent Form, as such laboratories have more experienced personnel and tend to more closely follow compliance trends in the law.

Types of Tests

As with other aspects of drug testing, there is no bright-line rule regarding what kind of testing is permitted or prohibited. That being said, courts in California *will* consider the *type of test administered* in its analysis of the test’s intrusion on the employee’s constitutional rights to privacy. For example:

— A pupillary-reaction eye test (i.e., shining a flashlight in someone’s eye and watching the eye’s pupillary reaction) or a hair follicle test are deemed less intrusive than blood, urine, or breath tests.

— In situations where urine tests have been upheld (and they have in a variety of contexts), the courts looked at the extent to which the employee was monitored while supplying the urine, which I discussed above.

**Other Issues**

In addition to the above-referenced matters that employers need to take into account when it comes to drug testing job applicants and employees, there are a variety of tangential issues to be aware of as well.

Confidentiality

Courts have held that employers must maintain strict confidentiality of all the information and records related to an employee’s drug tests. The Drug Testing Consent Form that I’ve prepared for {{ text\_company\_short\_name }} addresses this issue.

Labor Code Requirements Related to Drug Testing

Certain Labor Code requirements are also implicated in the drug testing arena (both of which are addressed in the Drug Testing Consent Form). For example, California law requires employers to: (a) pay the fees and costs associated with the drug tests demanded; (b) pay employees for the time spent undergoing the testing (including travel to and from the testing facility); and (c) reimburse employees for miles driven to and from the testing facility.

Options Following Positive Test Results

Once again, California law provides no specific rules regarding what adverse actions employers may take against job applicants or employees because of their test results (unless the Americans with Disability Act is implicated, but that’s a subject for another letter). In my opinion, however, in the case of job applicants, I think employers are relatively safe in rejecting an employee following positive test results.

Likewise, when it comes to employees, while I have to acknowledge that the threshold is a bit higher than it was when dealing with mere job applicants, as long as the drug testing procedures were fair (as discussed above) and as long as the drug test didn’t otherwise violate an employee’s right to privacy (or, at the very least, {{ text\_company\_short\_name|possessive }} right to ensure the safety of its other employees and/or the public reasonably outweighed that employee’s right to privacy), if an employee’s test results come back positive, I think {{ text\_company\_short\_name }} would be well within its rights to immediately terminate that employee.

Still, though, because looking *reasonable* is so important to a court considering the legality of a particular employer’s drug testing policy, I included a provision in the Drug Testing Consent Form that gives an employee who tests positive for drug use the right to take a retest. This not only ensures fairness (there is such thing as a false positive), it is fundamentally *reasonable*.

Consequences for Violations of Job Applicant’s/Employee’s Right to Privacy

Individuals in California have what’s called a private right of action—i.e., the right to prosecute lawsuits on their own behalves—against those who they claim breached their constitutionally protected privacy rights, including *illegal* drug testing. Such lawsuits could seek monetary damages or injunctive relief, and *intentional* violations could be prosecuted as misdemeanors.

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Fortunately, I had the issues raised above in mind when I prepared the Drug Testing Consent Form for {{ text\_company\_short\_name }}. And thus, so as long as {{ text\_company\_short\_name }} uses it consistently and properly, it should have no problem implementing its drug testing policies. Of course, if you have any questions regarding the use of the Drug Testing Consent Form, please don’t hesitate to contact me.

Sincerely yours,

/s/

{{ text\_kc\_attorney\_name }}

1. Transportation employees, such as drivers of commercial motor vehicles, must comply with federal law. California’s transportation drug testing law mirrors the requirements of the US Department of Transportation Federal Motor Carrier Safety Administration’s drug and alcohol testing regulations and is not summarized here. This letter also does not cover the laws surrounding the use of drug testing involving employees covered by a collective bargaining agreement. [↑](#footnote-ref-1)
2. For example, direct monitoring of a person providing a urine sample may be an unreasonable intrusion, while indirect monitoring of the process is only a negligible intrusion into protected privacy interests. [↑](#footnote-ref-2)
3. As it so happens, this aligns with {{ text\_company\_short\_name|possessive }} position on the matter. Indeed, when I raised this issue with you during our recent telephone call, you stated that it was {{ text\_company\_short\_name|possessive }} policy to prohibit marijuana use amongst its employees, including its medical use permitted under California’s Compassionate Use Act, and its recreational use permitted upon the passage of Proposition 64. [↑](#footnote-ref-3)
4. {{ text\_company\_short\_name }} should always keep in mind that the balancing test that the courts employ weighs the need for the test with the rights of the employee. Take for example the employee who has exhibited symptoms of being “high” (which would in most cases support an employer’s right to conduct a drug test)—if the test is unfair or otherwise violates the employee’s rights (e.g., a particularly invasive screening procedure or a test conducted during an employee’s off-duty hours)—a court might find that the test was illegal *not* because the employer wasn’t justified in conducting the test, but rather because it intruded too much on the employee’s privacy rights. Again, the Drug Testing Consent Form that I prepared for {{ text\_company\_short\_name }} addresses this issue. [↑](#footnote-ref-4)
5. An employee is deemed to be in a safety-sensitive position when the employee’s drug-affected performance could clearly endanger the health and safety of the employee or others. In addition, an employee who has failed a drug test or has admitted to drug use may be required to submit to periodic additional testing for the next year. Consequently, I would argue that *anytime* an employee is driving a company vehicle, or *regularly* drives his/her own vehicle, that the employee is in a “safety” related job. Courts may not, however, share that opinion, and thus I don’t recommend that as the sole basis for conducting such testing. [↑](#footnote-ref-5)