

**Workplace Drug Testing in California**

The federal government has limited laws regarding drug testing. Therefore, drug testing is mostly a state issue. California’s state constitution has a privacy provision that protects California citizens’ right to privacy. California courts have held that drug and alcohol testing programs implicate privacy rights for both private and public employees.

However, not all drug-testing procedures are unlawful in California. To determine whether a particular drug-testing procedure is lawful, California courts have used a “balancing test.” Under the balancing test, an employer’s reason for the drug testing is weighed against the employee’s right to privacy. Whether a drug-testing procedure is lawful depends on whether the drug testing was pre-employment testing, random testing, or reasonable suspicion testing.

**Heavy Equipment/Hazardous Equipment Operation**

Heavy equipment operators might meet a safety sensitive definition in California, but there is no absolute list that the state gives so employers are assured they will not be violating an employee’s rights to privacy, which is the basis California restricts random drug testing.  So that is not a yes or no answer.

Also, we never recommend the employer administer the test, all that does is call the test in to question, and if someone is seen drinking or using drugs on the job a test might not be necessary for disciplinary action to ensue. If the question is of impairment, we would recommend the employee be transported (not allowed to drive) to the testing facility.

**Types of Testing**

1. **Pre-Employment Drug Testing**

“Pre-employment drug testing” is when an employer requires an employee to take a drug test as a condition of employment after a job offer is tendered but before the employee goes on the payroll. In California, pre-employment drug testing is usually valid as long as it is not administered in a discriminatory manner.

2. **Random Testing**

California employers may not require their employees to submit to random drug testing unless the employee has a position affecting the public safety.

3. **Reasonable Suspicion Testing**

California courts have upheld “reasonable suspicion” drug-testing procedures in many circumstances. “Reasonable suspicion” drug-testing procedures are valid if there was evidence of drug or alcohol abuse.

4**. Post-Accident Testing**

Employees can be subject to testing when they cause or contribute to accidents that seriously damage a vehicle, machinery, equipment or property or result in an injury to themselves or another employee requiring offsite medical attention in which there is a reasonable basis for concluding that drug use could have contributed to the incident.

*Under the California Drug-Free Workplace Act of 1990, Cal. Gov. Code 8350 et seq. (modeled after the federal act), only employers who are awarded contracts or grants from any state agency must certify to the contracting or granting agency that they will provide a drug-free workplace. The contractors must also have a written policy for their employees.*

In addition to California, seven states have enacted protective legislation that restricts drug testing in the private workplace and gives employees some measure of protection from unfair testing. While not perfect, these new laws place significant limits on employers' otherwise unfettered authority to test and give employees the power to resist unwarranted invasions of privacy. In June of 2009, the California Supreme Court further restricted private employers’ drug testing powers in two significant decisions. The Supreme Court failed to overturn two state appeal court decisions in favor of workers who sued their employers because they were fired for refusing to submit to random drug tests. The court did not elaborate on its decision but issued a one-line order in each case refusing to hear company challenges of the lower court actions. "My impression, based on those two cases, is that random testing is pretty much dead in California," claimed one of the attorneys who wrote the San Francisco ordinance banning random testing, the first such law in the nation. Both employees, one a computer programmer for Southern Pacific Transportation Co. in San Francisco and the other an employee of Kerr-McGee Chemical Corp. in Trona, Calif. had charged that random testing violated their state constitutional right to privacy. Both Appellate courts had ruled that such random testing was an invasion of privacy.

In the Southern Pacific case, Barbara A. Luck, a computer programmer, won a $485,042 jury award based on her claims of wrongful firing because she was dismissed in 1985 when she refused to submit to a urine test. James Semore, the Kerr-McGee employee, was fired in 1986 because he refused to submit to a pupillary reaction eye test. The appeal court upheld his right to file suit based on violation of privacy rights.

As pointed out by one attorney for the Employment Law Center, the Supreme Court had an opportunity to approve of random testing of current employees in either the Luck or Semore case and did not do so. Based on the two appeal court decisions, the law in California now seems to be that an employer needs a compelling interest to order random drug tests for employees. It is likely that only safety sensitive jobs might come close to meeting that tough legal standard, and even in those cases the courts have not yet looked favorably.

The Luck and Semore appeal decisions did differ in one legal area that needs to still be resolved by the high court at a later time. While the Luck decision held that her firing was not a violation of public policy, the Semore decision held the opposite -- which his firing was a violation of public policy and that if his privacy right is affected, everyone else facing drug testing could be affected as well.

**CONCLUSION**

Certainly in safety and related fields, it is probable that the employer, whether private or public, can institute appropriate random testing, but in all other fields of employment, aside from the Federal government, the restrictions on random testing can become vital for the employer to recognize and even other types of testing than random must be carefully considered and implemented to avoid the numerous regulatory restrictions. Note that local ordinances, such as those of San Francisco, can impose yet more restrictions upon the appropriate testing. It is thus important for both the employer and employer to familiarize themselves with Federal, State and local ordinances as to drug testing.