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## Employment Law: Employers must enforce drug-testing policies in a way that minimizes exposure to tort claims

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Throughout the nation, drug testing has become increasingly prevalent in recent years as employers seek additional protection for their human-resource investments. For many employers, drug-testing policies have proved indispensable as a safeguard against hiring and retaining employees with potentially dangerous drug or alcohol problems.

In states like California, however, such practices remain a thorny issue, as employers must carefully enforce any drug-testing policy in a way that does not increase their exposure to employment-related tort claims, especially for invasion of privacy.

In most circumstances, an equitably applied drug-testing policy improves employee morale, decreases absenteeism, increases productivity, improves workplace safety and positively impacts profits. But drug testing done indiscriminately may also create liability for violating privacy rights protected under Article I, Section 1 of the California Constitution.

Generally, there are four types of drug testing: pre-employment screening, random testing based on "reasonable suspicion" and post-accident testing. Under each, an employee (or applicant) has varying degrees of privacy protection, and the employer has differing duties. One common theme for all types of testing is that providing employees with advance written notice of a drug-testing policy diminishes an employee's (or applicant's) reasonable expectation of privacy.

**Pre-employment testing.** Most employers can require an applicant, as a condition of employment, to pass a pre-employment examination that includes a drug screening. The Americans With Disabilities Act allows for a medical examination, including a drug test, only after an offer of employment has been made and before an applicant begins job duties. Once an applicant begins employment, an employer must adhere to the stricter limits required by random, reasonable-suspicion or post-accident testing.

Pre-employment drug testing will have a greater likelihood of being held valid if it is conducted in a manner that respects the applicant's dignity and uses reliable and updated techniques. Thus, an

employer can require an applicant to undergo suspicionless drug testing when the applicant consents to a confidential and relatively unintrusive urinalysis test as a condition of a job offer.

**Random testing.** Pursuant to a written policy, random drug-test policies may compel employees to submit to testing at any time during their employment -- for any reason or no reason at all. With very limited exceptions, random drug testing is not allowed in California.

Generally, in determining whether random testing invades the right to privacy, courts weigh the employees' reasonable expectation of privacy against the employer's legitimate business interests.

Cases upholding random drug testing are limited to instances where employees work in positions critical to public safety or the protection of life, property or national security (e.g., truck drivers and aviation personnel). Generally, California law does not support random testing of an employee whose job duties cannot be shown to directly impact public safety.

**"Reasonable suspicion" testing.** Courts have found that employers have a compelling interest and are justified in testing employees when there are sufficient objective factors, including reasonable inferences, forming the basis for a reasonable suspicion that the employee is abusing drugs.

Reasonable suspicion is suspicion that requires further investigation based on some factual foundation, for example, when the physical appearance and behavior of an employee suggests drug use or possession of drugs, or there are other indications that the company's substance-abuse policy was violated. These may include alcohol on the breath, unusually slurred speech, lapses in performance, inability to respond to questions and physical symptoms of alcohol or drug influence.

If an employer decides to undertake this type of testing, it is recommended that employers take steps to ensure that supervisors are trained in what constitutes sufficient grounds for testing and in the importance of applying the policy evenhandedly. Employers should consider requiring a designated individual, or individuals, to pre-approve drug testing to help ensure the procedures are followed properly and uniformly.

Requiring an employee to undergo a drug test where there is reasonable suspicion that the employee is under the influence of drugs or alcohol is likely to be upheld if the employer requires testing pursuant to an established written policy and if that suspicion is legitimate. Failure to prove actual reasonable suspicion for testing may lead to liability.

**Post-accident testing.** Many employers seek drug and alcohol testing of employees following serious on-the job accidents.

Courts generally have upheld post-accident testing where an employer has reasonable suspicion that the employee involved in the accident was under the influence of drugs or alcohol, where there is a

link between the accident and the drug use and where the accident was a serious one. Only employees responsible for the accident should be tested.

Therefore, if an accident occurs and an employer wishes to conduct a drug test, it first should be able to articulate objective evidence that led the employer to believe the accident was a result of drug or alcohol use.

Applying a policy in an inconsistent manner could cause the employee to believe that he or she is being singled out or discriminated against for another reason. Drug-testing policies are no exception. Therefore, if an employer decides to implement a drug-testing policy, it should be careful to act evenhandedly with all employees in strict accordance with written policies.

**Testing under the ADA.** The Americans With Disabilities Act does not prohibit drug testing to determine whether an employee is using illegal drugs. However, employers should be cautious in taking any action against employees who use prescription drugs as treatment for disabilities covered by the ADA. Employers should not ask employees to explain the illness or medication to the employer or stop taking their medications, nor should they discriminate against those with disabilities.

However, especially in industries where safety concerns are prevalent, an employer may request assurances that the medication used will not affect the employee's ability to perform the job safely or endanger the safety and well-being of others.

An employer's duty of reasonable accommodation applies to alcoholism and drug addiction. A commonly requested accommodation is allowing an employee to take a leave of absence to attend a rehabilitation program or undergo rehabilitation treatments. In general an employer should accommodate such requests unless the leave of absence will cause an undue hardship on its business or operations.

A request for leave doesn't insulate employees from discipline for a violation of company policy or misconduct caused by drug or alcohol abuse prior to the leave request. Courts, however, have been relatively protective of employees who enter rehabilitation programs.

Employers who have or want to implement a drug and alcohol testing program should be sure to:

- Have a written drug and alcohol policy in their employee handbooks.
- Require employees to sign an acknowledgment of receiving and reading the employee handbook.
- Identify safety-sensitive positions and have the documentation necessary to support these designations.
- Identify legitimate interests for drug testing and have the documentation necessary to support those interests.
- Train supervisors on what factors constitute sufficient grounds for reasonable-suspicion testing and the importance of applying the policy evenhandedly.

- Train supervisors on the ramifications of taking action against employees who use prescription drugs as treatment for a disability covered by the ADA

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