

Reprinted from **Privacy Compliance and Litigation in California**, copyright 2015 by the Regents of the University of California. Reproduced with permission of Continuing Education of the Bar - California (CEB). No other republication or external use is allowed without permission of CEB. All rights reserved. (For information about CEB publications, telephone toll free 1-800-CEB-3444 or visit our web site - [CEB.com](http://www.ceb.com).)

8

Workplace Privacy

§8.46 2. After Hiring

Drug testing after hiring typically falls into four categories: (1) random testing, (2) testing based on a reasonable suspicion of intoxication, (3) testing related to off-duty activities, and (4) fitness for duty.

Current employees may be subject to random drug testing if they hold safety-sensitive or security-sensitive positions. *Smith v Fresno Irrig. Dist.* (1999) 72 CA4th 147, 162 (upholding termination for results of random drug test of a construction worker whose responsibilities included hazardous waste duties). Current employees may also be subject to testing (at least as part of an annual physical) if they work in a hazardous work environment. See *AFL-CIO v Unemployment Ins. Appeals Bd.* (1994) 23 CA4th 51, 66 (employee on offshore drilling platform terminated for refusing to submit to annual drug test was not entitled to unemployment benefits; employer had “compelling interest” in the testing because oil drilling platform was a hazardous work environment and employee knew when he took the job that drug test could be ordered at any time). Otherwise, random drug testing may violate an employee’s state constitutional right to privacy. *Luck v Southern Pac. Transp. Co.* (1990) 218 CA3d 1, 23, disapproved on other grounds in *Hill v National Collegiate Athletic Ass’n* (1994) 7 C4th 1, 56; *Semore v Pool* (1990) 217 CA3d 1087, 1097 n4.

The following factors should be considered in analyzing the constitutionality of random drug testing:

- The employer’s business and whether the job involves safety-sensitive or security-sensitive work;
- The employee’s reasonable expectations of privacy, if any;
- Whether the employee was given notice, impliedly or expressly, that he or she might be subjected to random testing;
- Whether the method of testing was a reasonable intrusion into the employee’s privacy;
- Whether the results of the testing were adequately kept confidential.

When an employee handbook states that employees may be asked to submit to drug testing on a reasonable-cause basis, employees may reasonably infer that random testing will not occur. *Kraslawsky v Upper Deck Co.* (1997) 56 CA4th 179, 188.

NOTE► One difficulty with drug and alcohol testing is that it sometimes identifies past usage. Generally, employers have no legitimate interest in discontinued habits and inquiry into such habits may be unreasonable.

Drug testing based on reasonable suspicion of intoxication is more likely to be upheld than random drug testing. Although California courts have not squarely addressed the issue, it appears that an employer may test an employee if it has a reasonable suspicion that he or she was intoxicated on the job. Post-accident drug testing is a variation of reasonable-suspicion drug testing and is probably subject to the same analysis.

PRACTICE TIP► Employers enhance their right to conduct such testing if, in advance of any incident, the employee receives notice that it is the employer's policy to test following all accidents and if such testing is uniformly and consistently done.

California law prohibits an employer from inquiring about marijuana convictions that are more than 2 years old. Lab C §432.7(a). However, three unsuccessful job applicants were unable to bring a class action against their employers for illegally inquiring into marijuana convictions that were more than 2 years old when the plaintiffs had no marijuana-related convictions and were thus not injured or damaged by the inquiry, even if unlawful. *Starbucks Corp. v Superior Court* (2008) 168 CA4th 1436.

When the balancing test is applied in an invasion of privacy claim based on off-duty drug testing, such testing is usually found to violate an employee's reasonable expectations of privacy. See *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1361d 491 (off-duty drug testing injunction upheld).



For further discussion, see [Privacy Compliance and Litigation in California](#): Workplace Privacy, chapter 8 (Cal CEB). Available in print and through [OnLAW](#).

Learn best practices for protecting against data breach—and avoiding penalties and lawsuits. Understand how to collect and protect customer data, children's data, and data sent across borders. Discover practical guidance for business, finance, health care, and employers on California, federal, and international data and security law.