Drug & Alcohol Testing Toolkit (Non-DOT)

California Employers Association™

Table of Contents

This toolkit applies to non-Department of Transportation (DOT) employees only.

Who Can Be Tested and When

California is one of a few states that guarantees an individual's right to privacy in its Constitution. As such, there are restrictions on when and how California employers may test for drugs and alcohol. There are four circumstances when you may be permitted to conduct drug/alcohol testing in California, including:

- Pre-employment screening
- Reasonable suspicion testing
- Post-accident testing
- Random testing (***very limited – only applies to select employers***)

Unless you have DOT-regulated employees, fall under certain federal contracting/licensing requirements, or are otherwise required to drug test under state, federal, or local law, most employers are **not required** to conduct drug or alcohol testing. Rather, it is often a matter of employer discretion, in accordance with policy. For example, an employer may choose to establish a policy of conducting job applicant testing, but opt not to include reasonable suspicion testing within their policy.

In all instances, California prohibits arbitrary or capricious drug or alcohol testing. Each of the testing situations has its own requirements, as discussed below.

Pre-employment

Under California law, an employer may conduct controlled substance tests on job applicants only after the applicant has received a conditional offer of employment and before they begin work. The employer must cover the costs associated with drug and alcohol testing, including for applicants.

Consistency is important. The same test should be administered for all applicants for the same job. An employer should not select only certain applicants for testing, based on educational experience, appearance, or any other characteristic, as this may violate the Fair Employment and Housing Act and other laws.

Employers should use a Pre-Employment Testing Authorization Form provided by their Drug Testing Facility.

Note: In California, there are restrictions on how an employer may test for cannabis (marijuana), as discussed further below.

Reasonable Suspicion

You may require an employee to take a test if the employer has a "reasonable suspicion" that the employee is under the influence of drugs or alcohol based on specific facts and reasonable inferences drawn from those facts.

"Reasonable suspicion" has been defined by courts as something less than probable cause but more than a mere suspicion. It requires further investigation and must be based on objective

facts, observations, and rational inferences drawn from those facts/observations. Examples include the smell of alcohol or cannabis on breath, lapses in performance, inability to appropriately respond to questions, other physical systems, etc.

It is usually recommended that the supervisor/manager observes more than one symptom or behavior, and that another person confirms the same or similar observations, prior to reasonable suspicion testing. Employers should also consider if the symptoms or behavior could be attributable to things other than drugs or alcohol.

Additional steps/considerations for reasonable suspicion testing are outlined further below.

Post-accident

Federal Occupational Safety and Health Administration (OSHA) has stated that employers cannot deter proper reporting or retaliate against employees for the reporting of a workplace injury or illness. This could be as simple as verbal threats of retaliation if employees report accidents; or, if could be far more subtle, cloaked as an "incentive" for teams or department with the least number of injuries in a given time period.

To that extent, OSHA believes that "blanket post-injury drug testing policies deter proper reporting." That means, employers may not have a policy or procedure that automatically mandates drug testing after every accident, injury or illness. This rule makes automatic drug testing illegal because it has been shown to discourage employees from properly reporting injuries. However, you may still use your discretion and drug test an employee after an incident under reasonable suspicion testing. For this reason, employers should view "post-accident" testing as a form of reasonable suspicion testing, and follow the same requirements above.

Random

"Random" drug testing programs are those in which an employer informs employees that they may have to submit to drug testing at any time during their employment for any reason or no reason at all.

In California, in order to conduct non-DOT random testing, an employer must have a "compelling interest" in order to randomly drug test. Courts have found a "compelling interest" present in only very few circumstances.

Cases upholding those standards were limited to employees in the following situations:

- Employees in positions that are critical to public safety or the protection of life, property, or national security
- Employees in professions that can be categorized as part of a pervasively regulated industry, where the employee has less expectation of privacy given the nature of employment

For example, random testing has been upheld for truck drivers under the Federal Highway Regulations, aviation personnel, and correctional officers having contact with prisoners.

Additionally, licensed officers and crew members on vessels that require a license to operate may be randomly drug tested. With these narrow exceptions, random drug testing is not recommended in California. For additional questions, it is best to consult legal counsel.

Cannabis-Use Protections

California's Fair Employment and Housing Act (FEHA) prohibits employers from discriminating against an employee or job applicant based on that employee's cannabis (marijuana) use that is off the job and away from the workplace. This protection impacts how California employers may test for cannabis.

More specifically, if a California employer wishes to test for cannabis, whether as part of pre-employment screening, reasonable suspicion, etc., the employer is prohibited from using a test that identifies *non-psychoactive* cannabis metabolites (which could indicate past usage and/or off the job usage). Employers are still permitted to test and take adverse action based on *THC-positive* testing (i.e., psychoactive components), which indicates recent usage. You may still prohibit employees from possessing or being under the influence of cannabis while working or at work.

As a practical matter, employers wishing to test for cannabis should work with a qualified testing provider to ensure the testing method is compliant (e.g., saliva-based test) and does not identify non-psychoactive metabolites.

There are exceptions to the off-duty cannabis use protections, including employees in the building/construction trades, employees falling under a federal contract or license requiring controlled substance testing, or employees otherwise required to test under state, federal, or local law (e.g., DOT-regulated drivers).

Before you Begin Testing

Before you can begin any post-employment drug or alcohol testing, you must inform your employees that they will be subject to controlled substance testing and under what conditions you may test them.

Drug Free Work Place Policy

One of the best ways to notify your employees is to include a policy in your employee handbook or have your policy as a stand-alone document, distribute to each employee, and have them acknowledge receipt in writing.

- **Reason for policy** – this informs your employees of the reason you are instituting rules concerning drugs and alcohol, e.g., effects on safety, performance, attendance, etc.
- **Unacceptable behaviors** – this informs your employees what specifics you consider prohibited, e.g., possession, use, or working under the influence, driving company vehicles under the influence, etc.

- **Employee reporting requirements** – you should include a requirement that your employees must notify you if they are taking legal medications that may present a "safety risk" or otherwise impact their job.
- **Reasons for testing** – list each circumstance when an employee may be tested (e.g., reasonable suspicion)
- **What will happen if they fail or refuse to test** – these are elements you should have for unemployment purposes: the employee knew what would happen if they violated the policy, including up to termination of employment.
- **Rehabilitation options** – employers with 25 or more employees must reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program.
- **Re-employment opportunities** – a blanket prohibition on re-employment of workers terminated for violating company policy may violate the FEHA/ADA if it excludes those "recovered" from drug or alcohol addiction from reemployment.
- Refer to CEA's sample Drug Free Workplace Policy template to create your own.

Policy and Procedures for Managers and Supervisors

You should also have a policy and procedure document for managers and supervisors that contains guidance to your management team about how to respond to issues concerning drugs and/or alcohol and employee testing. Your policies and procedures for managers and supervisors should include:

- When drug testing will be required.
- Manager's guidance for reasonable suspicion testing – your managers need to know what constitute reasonable suspicion and how they determine if that exists. We also recommend to conduct reasonable suspicion training for Supervisors and Managers.
- Refuse to test procedures – your managers need to know what they should do if an employee refuses to submit to a drug test and how it should be documented. Managers should know your company procedures if an employee is suspended for refusal to test.
- Associated forms – employers must keep good records and should have a Reasonable Suspicion Checklist, as well as an Employee Drug Testing Consent/Declination.
- Refer to CEA's sample Management Drug Testing Policies and Procedures template to create your own.

Reasonable Suspicion Testing Process

It is advisable, if possible, to have two supervisors or managers conduct a joint Reasonable Suspicion Investigation and independently determine if they believe reasonable suspicion exists. This helps prevent claims that a manager has some personal animosity against the employee that affected their decision to test.

Deciding Whether to Test:

Step 1

Document your observations – supervisors/managers may use this Reasonable Suspicion Checklist. If possible, have two members of management complete the checklist. It is more difficult for an employee to claim that the one manager "had it out" for them to begin with and fabricated the observations in order to improperly test the employee.

Step 2

Meet with the employee – this is part of your further investigation process. Meeting with the employee and having interaction with them gives you the opportunity to further observe the employee for other possible symptoms of impairment other than what you already know. Ask the employee if there is a reasonable explanation for the employee's behavior or your observations. You should explain your observations to the employee and give them the opportunity to respond. For example, if you smelled alcohol on the breath of an employee, but the employee explains they drank a non-alcoholic beer before coming to work, assess whether the response is credible. If the smell of alcohol on the breath is your only observation you probably will not have "reasonable" suspicion and should not test.

Step 3

Analyze all items presented – consider all evidence, including multiple reports from employees, your observations, and objective factors. If employee's response does not explain your observations and the employee is exhibiting multiple suspect behaviors, then you may have reasonable suspicion. For example, if the employee exhibits bloodshot eyes, cannot maintain balance, or their speech is slurred, you probably would have reasonable suspicion and could require the employee to submit to a drug test. If you are challenged on your drug testing policy or procedures, the issue goes to the California court system for adjudication, so employers should always be thinking about what a jury may think.

Step 4

Consider whether testing makes sense – even if an employer is legally permitted to test an employee for drugs or alcohol, they should weigh the advantages and disadvantages of testing in particular situations. One primary consideration is whether testing will provide meaningful information. For instance, if an employer learns that, several days before, an employee engaged in behavior that evidenced reasonable suspicion of drug or alcohol use or impairment, a test may not be able to determine the presence of drugs or alcohol due to the time lapse. Further, testing will most likely not be permitted because of the time lapse.

In situations involving misconduct arising from suspected impairment (above and beyond misconduct solely for being impaired at work), an employer may instead choose to focus and act on such misconduct, regardless of whether drug or alcohol use/impairment caused or contributed to the misconduct. While the law places restrictions on an employer's ability to test,

generally, an employer is not restricted from taking employment action for other reasons, such as misconduct, even if the misconduct is related to drug or alcohol use.

If You Decide to Test:

Step 1

Inform the employee that they are being directed under company policy to submit to a drug test for reasonable suspicion. Explain what the process will entail:

- How they will be escorted and/or transported to a drug testing facility
- How the test will be conducted (e.g., urine sample, hair follicle, saliva sample)
- What the employee's status will be, pending the results. Since most testing procedures do not provide you with instant results, you should inform the employee what their status is (e.g., suspended without pay or suspended with pay, approximate time for decision, employee notification of results, etc.)
- Explain what will happen if they refuse the drug test, in accordance with policy

Step 2

Ask the employee to consent to the drug test in writing. Submitting to a proper drug test is considered an employer's requirement for continued employment and, as such, an employee has a right to decide not to continue employment and refuse a drug test. If the employee refuses to test, it is a good idea to remind the employee of the consequences. Ask the employee to consider this before they consent or decline. Refer to CEA's sample Employee Drug Testing Consent/Declination.

Step 3

Transport or escort employee to testing facility. If the employee consents, arrange transportation to the testing facility. **Never** require an employee to submit to any post-accident or reasonable suspicion test and then have them drive. Remember, the employee is on-the-clock and the company is liable for their actions. Consider the liability you could incur if an employee got into an automobile accident on the way to the testing facility and it was shown you suspected the employee of being impaired but put them behind the wheel anyway.

Step 4

Assist with transport arrangements for employee to return home, following testing. Even though the employee can officially be off-the-clock **after** they have been excused from the testing facility and is free to leave, you should not just drop them off at the testing facility and leave them stranded without ensuring they have a way to get home. Explore possibilities of them calling a friend or relative, or if they can afford to take a bus, taxi, or rideshare. You may have to drive them home if there is no other alternative. The employee should remain on-the-clock until they are dismissed from the testing facility.

Note on DOT-Regulated Employees

It is important that an employer distinguishes between federal Department of Transportation (DOT) and non-DOT drug and alcohol testing, since it is crucial for DOT tests to be completely separate from non-DOT tests, in all respects. This is especially important for compliance with federally mandated, random DOT drug and alcohol testing rates for employers. There are also specifically mandated Custody and Control Forms for all DOT drug and alcohol specimen collections that must be used, and which are unique from non-DOT collection forms. Further, state law does not apply to DOT drug and alcohol tests. **This tool kit does not contain DOT information or procedures.**

Confidentiality of Drug Testing Information

Make sure your supervisors and managers know they must not talk about any employee's drug or alcohol issues with other managers or employees who do not need to know. In many instances, "need to know" is determined by the employer, not the supervisor or manager.

Labor Code 1026 mandates that an employer make reasonable efforts to safeguard the privacy of the employee as to the fact that they have enrolled in an alcohol or drug rehabilitation program. Drug Testing and Drug Rehabilitation documents are confidential records and must be maintained in a private file separate from the employee's personnel file, and generally kept for a minimum of five years after the employee's date of separation.

Medical information and reasonable accommodation considerations

Finally, you may have questions about how drug testing is impacted by an employer's reasonable accommodation requirements. For example, under the California Fair Employment and Housing Act (FEHA), employers with 5 or more employees must reasonably accommodate an employee with a disability and/or medical condition so long as they can perform the essential functions of their job, with or without reasonable accommodation, unless it would cause an undue hardship. This may include, if reasonable, working with an employee who needs to take a **prescription medication** that may impact their work.

Reasonable accommodations may include adjusting an employee's work hours, providing medical leave, or modifying tasks and duties. It would not however require you to allow an employee to use controlled substances (e.g., cannabis) on the job, or use a prescription medication that would cause a safety issue (e.g., impact a driver's ability to safely operate a vehicle).

If you suspect an employee is impaired by drugs or alcohol at work, you should always consider whether it may be due to a legal prescription and whether a reasonable accommodation is required. For instance, if the employee informed you they are taking a prescribed medication, you should inquire about the side effects and physician's instructions regarding the medication,

and assess how that may impact their job. Ensure you get accurate information from the employee and their health care provider to determine if a reasonable accommodation is needed/appropriate. However, based on confidentiality protections in California, you should never inquire into or require the employee to provide information on their *underlying diagnosis, medical condition or disability*. For the employer's purposes, you just need to know what limitations or restrictions the employee may have, as certified by their health care provider. Employers may use this Reasonable Accommodation Packet to document the process.