

Employer Need Not Reimburse Travel Expenses for Drug Test

California Employment Law Update Blog on June 16, 2022

A federal appeals court recently affirmed a summary judgment entered in favor of WinCo Foods in a class action alleging that WinCo should have reimbursed successful job applicants for the time and travel expenses they incurred in obtaining a drug test as a pre-condition of employment. In *Johnson v. WinCo Foods, LLC*, the court agreed with a lower court that WinCo was not obligated to reimburse those costs because plaintiffs were not employees of WinCo at the time that they took the drug tests.

The plaintiffs had advanced two arguments that they actually were WinCo employees at the time of the drug test. First, the plaintiffs argued that they were WinCo's employees because WinCo "controlled" the administering of the drug test. Under California law, a court may use the "control test"—examining how much control the alleged employer exercises over the alleged employee's "wages, hours, or working conditions"—to determine whether an employer-employee relationship exists.

However, the Ninth Circuit declined to apply the control test here because the plaintiffs were not working for WinCo when they took the drug test. Rather, the drug test was "part of the job application process" as opposed to "performance of the job."

In the alternative, the plaintiffs argued that under California contract law, an employment contract with WinCo had been formed prior to the drug test, at the time that WinCo notified the plaintiffs of the need to take a drug test to secure their "contingent job offer." The plaintiffs argued that a successful drug test was a "condition subsequent" to that existing employment contract, allowing WinCo to terminate the contract if the drug test was unsuccessful, but merely confirming the plaintiffs' existing employment status if they passed the drug test.

The Ninth Circuit disagreed, finding that a successful drug test was instead a condition *precedent* to an employment contract with WinCo. In its communications with the plaintiffs, WinCo was very clear that the plaintiffs' hiring would not occur until after a successful drug test by, for example, calling the job offer "contingent" and informing the plaintiffs that a successful drug test was a condition of that contingent job offer.

Given what the Ninth Circuit characterized as "the ubiquity of preemployment drug tests" and other job application requirements, this decision should be a welcome one for California employers. We will continue to monitor this case for any updates.

[View Original](#)

[Related Professionals](#)

- **Anthony J. Oncidi**
Partner
- **Dixie M. Morrison**
Associate