

# No payment due for pre-employment drug test time and travel costs

By Dan Eaton

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California law generally requires an employer to compensate employees while employees are under the employer's control. In addition, Labor Code section 2802 requires an employer to compensate its employees for all expenses and losses an employee incurs directly from "the discharge of his or her duties."

Must an employer pay a successful job applicant for the time and travel expenses required to take a pre-employment drug test after extending a conditional job offer?

The question has been raised in several recent cases in California federal trial courts brought against a range of employers. Those courts that have addressed the question so far uniformly have ruled in the employers' favor.

But no California state court has definitively answered the question. That is why the 9th Circuit U.S. Court of Appeals just issued a published ruling in *Johnson v. WinCo Foods, LLC* agreeing that an employer is not liable for an applicant's time and expenses in taking a pre-employment drug test.

## Facts

In hiring a new employee, a hiring manager from supermarket chain WinCo Foods calls a successful applicant and reads from what the company labels "verbal contingent job offer talking points." Among other things, the hiring manager is instructed to say: "as part of your contingent job offer with WinCo Foods, we will be conducting a pre-employment background check and drug test on you." If the applicant agrees, WinCo tells the applicant to report to a specific testing location. WinCo pays the drug testing facility's fees, but does not pay for the employee's time and travel costs associated with the testing.

A group of WinCo employees sued, claiming they should have been compensated for their test-related time and travel expenses.

## Ruling

The 9th Circuit upheld the trial court's summary dismissal of the suit. The court rejected plaintiffs' contention that they were entitled to payment because they were under the employer's control in taking the drug test when, where, and how the employer instructed. The plaintiffs contended that WinCo's exercise of control meant that there was an employment relationship at the time of the drug test. The problem with the argument, said the court, is that "control over a drug test as part of the job application process is not control over the performance of the job." The applicants were not yet employees.



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The court of appeals quoted the trial court's further explanation about why the degree of WinCo's control over the drug testing process did not mean the applicant was entitled to employment-related rights:

"There are many ways in which employers exercise some degree of control over job applicants. They may require that applicants appear at a certain time and place for an interview; that they undergo a writing or skills test.... The fact that employers control the 'manner' in which these activities take place does not magically convert applicants into employees."

Plaintiffs further argued that the drug test was merely a condition the employees had to satisfy after WinCo had effectively made them company employees. Not so, said the court of appeals. WinCo's hiring manager went "to great lengths" to caution successful applicants that the offer was conditioned on passing the drug test. The drug test, then, is what the law calls a "condition precedent" to the establishment of an employment relationship, not, as plaintiffs contended, a "condition subsequent" to an already formed relationship.

### **Takeaway**

Applying for a job costs applicants time and, sometimes, out-of-pocket expense. This recent 9th Circuit ruling confirms that the prospective employer is not responsible to the applicant — successful or not — for paying for any such time and expenses after a conditional job offer is made.

**Dan Eaton** is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek where his practice focuses on defending and advising employers. He also is an instructor at the San Diego State University Fowler College of Business where he teaches classes in business ethics and employment law. He may be reached at [eaton@scmv.com](mailto:eaton@scmv.com). His Twitter handle is [@DanEatonlaw](https://twitter.com/DanEatonlaw).