

SESSION THREE

GLOBAL WORKPLACE

TESTING:

Legal Aspects and Data Protection Review

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Disclaimer

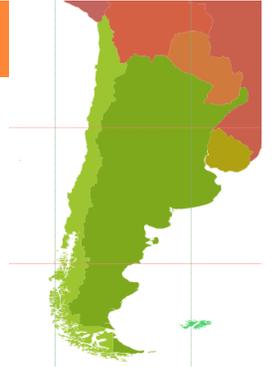
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Topics Presented

- Faye Caldwell – Latin American Country Summaries: Argentina, Chile, Mexico
- Kerstin Bagus – Data Protection Considerations: Latin America

International Drug Testing Overview

Country: Argentina

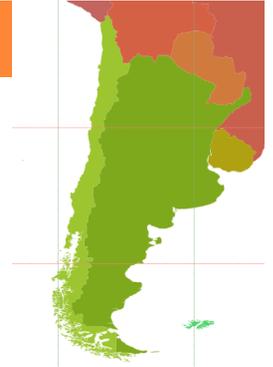


In general, there does not appear to be a federal legislative express prohibition on workplace drug and alcohol testing in Argentina, with no restrictions on test panel, analytes or specimen type, but an employer cannot force an employee to submit to a drug or alcohol test. However to the extent it is considered a medical examination, restrictions are in place. Results of medical examination cannot be used to discriminate against applicants or employees, and drug and alcohol tests may be considered invasive and a violation of an employee's intimacy and dignity. Adverse employment action based on a positive result may be considered discriminatory.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Overview

Country: Argentina



“Tests can be carried out, but there are restrictions in place.”

(UK Practical Law: <http://uk.practicallaw.com/3-541-0547?source=relatedcontent>)

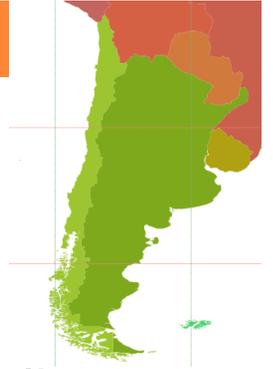
“The LCL does not expressly forbid alcohol and drug tests on employees; however, employees could not be compelled to submit themselves to said tests by their employers. According to Argentine law, the results of medical examinations performed prior to employment cannot be used to discriminate (Labor Risk Superintendence Resolution 43/97). Employers must inform their employees of any illness revealed in the medical examinations (Labor Risk Superintendence Resolution 43/97). Alcohol or drug tests could be considered a violation to employee's intimacy and dignity ([Section 19, National Constitution](#)). In the event that any of these tests are positive, and the employer takes an action that could adversely affect the employee, such conduct may be considered discriminatory (Law 23,592 on Penalization of Discriminatory Acts). ”

Global Employment Handbook: <http://www.employmentlawalliance.com/globalemployerhandbook>

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International Drug Testing Observations

Country: Argentina



- No Rules / Regulations on testing protocols for private or public companies
- Labor Code silent on topic of alcohol or drugs at work
<http://www.infoleg.gov.ar/infolegInternet/anexos/25000-29999/25552/texact.htm>
- Certification required to ship human samples out of Argentina
 - Administración Nacional de Medicamentos (ANMAT), equivalent to FDA in the United States. Payment of ~ \$50USD.

Observations from Patricio Labatut, Global Partners

International Drug Testing Overview

Country: Chile

In general, there does not appear to be a federal legislative express prohibition on workplace drug and alcohol testing in Chile, with no restrictions on test panel, analytes or specimen type. However, consumption of illegal drugs cannot be the sole reason for refusing to hire an applicant. Rather, refusal to hire must be based exclusively on whether the consumption of illegal drugs affects the applicant's ability to perform the essential functions of the job or increased risk of accidents in the workplace. Past drug use cannot be used to discriminate against a rehabilitated user. All information regarding drug use and testing must be handled confidentially. However, if it can be determined that an employee is under the influence of drug or alcohol, it can be cause for termination.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.



International Drug Testing Overview

Country: Chile

“Drug, alcohol and tobacco tests are not prohibited under Chilean legislation. However, the consumption of illegal drugs cannot be the sole reason for refusing to hire an applicant. The decision not to hire someone must be based exclusively on the fact that the consumption affects his or her employment capacity or personal fitness. Also, a fundamental consideration would be whether such consumption increases the risk of accidents in certain work activities. In addition, past drug consumption cannot be taken as the basis to discriminate against a rehabilitated person. Any information obtained must be treated in a strictly confidential manner.”

GTDT: <https://gettingthedealthrough.com/area/18/jurisdiction/3/labour-employment-chile/>

“Even though parties can agree in the employment contract that the employer is entitled to conduct regular drug testing, it is advisable to establish such a procedure in the Internal Health, Safety and Hygiene Regulation. Although there are no specific rules regarding drug testing, Chilean Labor Authorities have set forth that drug controls can be carried out and related to -- as a time and territorial limit -- only while employees remain on company premises rendering their services. Therefore, the employer must not intervene in any conduct that is considered part of the employee’s private life. Also, the procedure to take drug tests must be executed respecting the employee’ dignity, private life, and honor, and impartial in terms of being applicable to all or some of the employees chosen randomly. Drug test results must be treated confidentially by the company and as sensitive data according to provisions of 19.628 Act. Regardless, if an employee carries out his/her functions under the influence of drugs or alcohol, it could be considered as cause for dismissal.”

Global Employment Handbook: <http://www.employmentlawalliance.com/globalemployerhandbook>

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International Drug Testing Observations

Country: Chile

One or the more advanced countries in region regarding alcohol & drug screening

- Working to establish national standard for drug free workplace

Alcohol & Drug Screening Use in Private Companies

- 5% use pre-employment & occupational testing
- 10% offer a prevention A&D course
- 85% do nothing.

Laws Supporting Testing

Labor Code: Forbids working under the influence of alcohol, but does not address drugs.

Mining Code: Forbids drug and alcohol use in mining operations and allowing police force if necessary to remove employees under the influence of alcohol and drugs.

Presidential Decree (P.D.) 1215: Establishes a testing protocol for public employees like similar to the United States Federal Drug Testing Mandated law but involves only some positions and not the decision makers like Ministers.

Court History

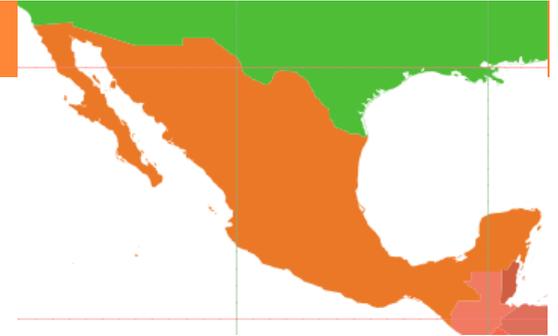
Trials for drug use in a workplace are just beginning. Chile currently has only 1 or 2 cases a year.

Observations from Patricio Labatut, Global Partners



International Drug Testing Review

Country: Mexico (2014)

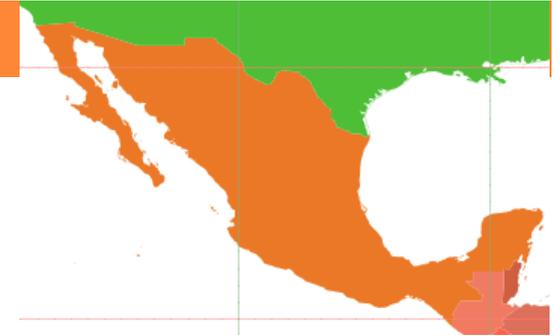


In general, workplace drug and alcohol testing is permitted in Mexico, with no restrictions on test panel, analytes or specimen type. Termination without payment of severance is allowed when an employee reports to work under the influence of alcohol or non-prescription drugs. Determining “under the influence” may be a challenge relative to non-prescription drugs.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Update

Country: Mexico



In general, there does not appear to be a federal legislative express prohibition on workplace drug and alcohol testing in Mexico, with no restrictions on test panel, analytes or specimen type. However, drug testing on applicants/employees can only be done with the express written consent of the applicant/employee. The obligation of employees to submit to drug and alcohol testing must comport with Internal Labor Regulations.

Employers in Mexico are able to carry out drug/substance abuse testing on employees, with the employee's written consent. The obligation of the employees to be subject to these examinations must be within the Internal Labour Regulations in order to be enforceable.

There is no legal provision prohibiting this testing. However, the results of such tests must be stored pursuant to the Federal Law on the Protection of Personal Data in the Possession of Private Parties and prior provision of the privacy notice to both, candidates and employees.

Secretariat of Employment and Public Welfare (www.stps.gob.mx/bp/secciones/conoce/marco_juridico/index.html)
Federal Institute of Access to Public Information (<http://inicio.ifai.org.mx/catalogs/masterpage/marcoNormativo.aspx>)

(UK Practical Law: <http://uk.practicallaw.com/3-541-0547?source=relatedcontent>)

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DATA PRIVACY UPDATE: LATIN AMERICA



OECD Basic Principles

The Organisation for Economic Co-operation and Development

- Collection Limitation Principle
- Data Quality Principle
- Purpose Specification Principle
- Use Limitation Principle
- Security Safeguards Principle
- Openness Principle
- Individual Principle
- Accountability Principle

Strict Privacy Regulations Exist

- No uniform framework as in EU
- Each country has their own set of regulations

Two Themes in Latin American Privacy



Habeas Data

Two “Adequate” Countries



- Argentina
- Uruguay

Privacy Regulations in LatAm (IAPP 3/2015)

- 1999: Chile - Personal Privacy Law
- 2000: Argentina - Data Protection Act
- 2001: Perú Credit Reporting Act
- 2001/4: Credit information statutes in Paraguay, Panama, Mexico, Ecuador and Uruguay
- 2004: Peru Spam Act
- 2008: Colombia Data Protection Law (credit)
- 2008: Data Protection Law of Uruguay
- 2010: Data Protection Act of Mexico
- 2010: Colombian Data Protection Law
- 2011: Data Protection Law of Peru
- 2012: Nicaragua / Costa Rica DP laws
- 2013: Colombia and Peru Regulations
- 2014: Brazil – Marco Civil de Internet (*internet privacy*)
- 2015: Chile Data Protection Bill

Data Protection Law Summary for LatAm

Commonalities

- Notice
- Choice
- Security
- Access & Correction
- Data Integrity
- Data Retention

Differences

- Cross-border transfer requirements
- Registration of databases
- Data security requirements
- Breach notification
- Data Protection Officer requirement
- Access requirement time frames
- Right to be Forgotten
- Penalties for violations

Argentina



Facts

Personal Data Protection Act

<http://www.protecciondedatos.com.ar/law25326.htm>

Dirección Nacional de Protección de Datos Personales (DNPDP)

<http://www.jus.gob.ar/datos-personales.aspx>

Highlights

- Restricts transfer to countries without “adequate” level of data protection
 - Adequacy may be obtained contractually



Chile

Facts

Proteccion de Datos de
Carácter Personal

<http://www.leychile.cl/Navegar?idNorma=141599>

No one Regulator

Consumer Protection Agency

<http://www.sernac.cl/>

Highlights

- First privacy law in LatAm
- Transfer follows the laws for general processing; no specific cross-border transfer restrictions
- Updates to law proposed in 2014
 - Create DPA & restrict cross-border transfer

Mexico



Facts

Ley Federal de Protección de Datos Personales en Posesión de los Particulares

http://inicio.ifai.org.mx/SitePages/English_Section.aspx

<http://inicio.ifai.org.mx/SitePages/PDP-Normatividad.aspx>

Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales (INAI)

<http://inicio.ifai.org.mx/SitePages/ifai.aspx>

Highlights

- Comprehensive privacy regulation
- Transfer requirements are for both domestic and international transfers
- Regulator seen as mature and strong with enforcement

Mexico Privacy Notice

What is it?

- Purpose
 - Make sure data owners are informed about their data processing
 - Allows for informed choice about processing
- Impact Data Controllers
- Three Levels of Privacy Notice
 - Comprehensive
 - Hard copy, electronic/digital (i.e. a web page), visual format (i.e. poster), by sound, or in another way
 - Simplified
 - As Above
 - Short
 - Limited space: coupon or an SMS message
- Privacy Notice Guide:
<http://inicio.ifai.org.mx/SitePages/Guia-para-el-Aviso-de-Privacidad.aspx>

Includes

- Name & address of data controller
- Purpose for the processing & how organization will use the data
- Options available to limit processing of their data
- How to access ARCO rights
- Third party involvement, if any
- Data transfer (nationally or internationally)
- How changes to Privacy Notice will be communicated

Resources

- DLA Piper Data Global Data Protection Handbook
<http://www.dlapiperdataprotection.com/#handbook/>
- Privacy in Latin America and the Caribbean
[http://www.mofo.com/~media/Files/Articles/2015/04/150428BNAPri
vacyLatinAmerica.pdf](http://www.mofo.com/~media/Files/Articles/2015/04/150428BNAPri
vacyLatinAmerica.pdf)
- Data Privacy Laws Latin America
<http://www.dataprivacylaws.com.ar/data-protection-laws/>

Thank You

**Thank you for your attention for
participating in Session Three**

**Global Workplace Testing:
Legal Aspects and Data Protection Review
(Jo), Dan, Faye, and Kerstin**

