

# Newest Developments in Workplace Drug and Alcohol Law

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# Agenda

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- Impact of Changing State (and Unchanging Federal) Marijuana Laws on Workplace Drug Policies
- Best Practices Related to Drug and Alcohol Testing
- Common Pitfalls for Prescription Drugs in the Workplace and How to Avoid Them

# Challenge: Consistency with Numerous and Conflicting Laws

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- U.S. & California Constitutions
- Federal and California Drug Free Workplace Acts
- Federal Americans with Disabilities Act and California Fair Employment and Housing Act
- Federal Controlled Substances Act and California's Compassionate Use and Adult Use of Marijuana Acts
- Federal Department of Transportation regulations

# Two Key Interests for Policies

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1. Ensuring a drug-free workplace, consistent with state and federal law
2. Protecting the rights of employees:
  - ensuring due process
  - preventing discrimination
  - meeting legitimate medical needs

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# **Impact of Changing State Marijuana Laws on Workplace Drug Policies**

# Impact of Key Marijuana Laws

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- Compassionate Use Act of 1996
  - Also implicates ADA/FEHA
- Adult Use of Marijuana Act (2016) (a/k/a Prop. 64)
- Federal Controlled Substances Act
- Federal and State Drug Free Workplace Acts

# Critical Provisions for Employers

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- Compassionate Use Act of 1996
  - Silent as to employment law impacts of medical marijuana usage
  - 2003 legislation – Medical Marijuana Program Act clarified that employers need not accommodate usage at the worksite or during work hours
- Adult Use of Marijuana Act (2016) (Prop. 64)
  - Explicitly permits employers to maintain drug-free workplace policies

# Where does this leave employers?

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- No need to hire applicants who test positive for marijuana metabolites – even if applicant holds a valid medical marijuana card
- Key case: *Ross v. RagingWire* (2008) 42 Cal.4th 920
- No need to accommodate usage of marijuana at work – regardless of whether it is for medical or recreational use
- Employers can maintain drug- and alcohol-free workplace policies



# Practical Considerations for Policy Enforcement: Positive Marijuana Tests

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- Testing is imprecise
  - See *Shepherd v. Kohl's Dept. Stores* (E.D. Cal. Aug. 2, 2016) 2016 WL 4126705
- Policy should be enforced consistently
- Strict enforcement may:
  - Lead to disability discrimination claims
  - Appear to conflict with broader City interest in encouraging cannabis sale/distribution within jurisdiction

# Marijuana Policies

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## KEY PRACTICE POINTERS

- Drug-free Workplace Policy should explicitly state that marijuana usage is prohibited
- Be precise in any discipline documentation
- Consider impacts of “zero tolerance” policy as applied to positive marijuana tests – and make sure City management structure is on the same page



# **Best Practices Related to Workplace Drug and Alcohol Testing**

# Two Groups of Employees

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1. Those subject to Federal Department of Transportation (DOT) regulations
  - May also include employees in other “safety sensitive” positions
2. Those not subject to DOT regulations

Key difference: Less weight placed on privacy interests of DOT-covered employees = means broader ability to test these employees

# Timing: What's Being Tested?

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## Drugs/Controlled Substances v. Alcohol

- Test for alcohol is considered a “medical examination”
- For applicants, alcohol testing is only permissible after conditional offer of employment
- Drug test may be completed prior to conditional employment offer

# Timing: Scope of Testing?

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–Pre-Hire

–Post-Hire

- Random
- Reasonable Suspicion
- Post-accident
- Return to Duty

# Pre-Hire Testing

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- Broader ability to test applicants than current employees

## **BUT**

- Right is *not absolute*
  - See *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 911
  - Compare to *Lanier v. Woodburn* (9th Cir. 2008) 518 F.3d 1147

# Pre-Hire Testing

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## KEY PRACTICE POINTERS

Limit pre-hire drug tests only to positions where there is a nexus between the job and employer interest in ensuring people performing those jobs are substance-free



# Random Testing

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Generally prohibited except for DOT-covered employees (where it's required) and others in “safety sensitive” positions

- What are “safety sensitive” positions in this context?

# Random Testing

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## KEY PRACTICE POINTERS

- Random testing should be avoided except where required for DOT-covered employees or in the case of a “safety sensitive” position
- Random testing of employees who are otherwise protected from random testing is not permissible even if part of collective bargaining agreement

# Reasonable Suspicion Testing

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Same standards generally apply regardless of whether employee is covered by DOT regulations

- Employees may be sent for testing based on “reasonable, individualized suspicion” that they are under the influence of drugs or alcohol at work
- One key difference: Explicit training requirements for supervisors of DOT-covered employees

# Reasonable Suspicion Testing

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## KEY PRACTICE POINTERS

- Critical to train supervisors to recognize signs of impairment even if they don't supervise DOT-covered employees
- Document objective observations

# Reasonable Suspicion Testing

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## KEY PRACTICE POINTERS

- Don't allow employees who are suspected of being under the influence drive themselves to the testing site
- Generally, don't involve the police department in reasonable suspicion evaluation

# Post- Accident Alcohol Testing

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- DOT-covered employees must be tested following certain accidents
  - Driver receives citation and (i) there is a bodily-injury with off-site medical treatment or (ii) there is disabling damage to vehicle requiring towing
  - Accident resulted in fatality
- No such requirements for non-DOT-covered employees

# Post-Accident Alcohol Testing

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## KEY PRACTICE POINTERS

- Consider whether there is reasonable suspicion for testing even in post-accident context
- Do not test only employees who report injuries/file workers' compensation claims
- Exercise caution when testing following accidents that fall outside of DOT regulations in the absence of reasonable suspicion

# Return to Duty Testing

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- For DOT-covered employees, there are extensive rules governing employees' return to duty following a positive drug test
  - Includes treatment/education from substance abuse professional and negative drug test
- No similar requirements for non-DOT employees
  - Employers arguably have broader options to address return to duty for these employees



# Return to Duty Testing Options

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- Rehabilitation
  - Consider ADA/FEHA issues
- Employee Assistance Program
- Last Chance Agreement
- Termination/Discipline



# **Common Pitfalls in Prescription Drug Policies and How to Avoid Them**

# Prescription Drugs: Common Pitfalls

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PITFALL: Treating medication as an illegal drug

- Prescription medication  $\neq$  Illegal drugs
  - Key exception: Medical Marijuana

# Prescription Drugs: Common Pitfalls

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## KEY PRACTICE POINTERS

Include exceptions in Drug and Alcohol Policy for legally prescribed medications

### **BUT**

Clarify that use of medical marijuana – regardless of whether an employee has a valid prescription – is a violation of the drug & alcohol policy when used at the worksite (or where employee is under influence at the worksite)

# Prescription Drugs: Common Pitfalls

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## KEY PRACTICE POINTERS

- Do not define “drugs” as expressly or implicitly including lawfully-prescribed medications
- Do not prohibit employees from taking prescription medications in the workplace

# Prescription Drugs: Common Pitfalls

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## KEY PRACTICE POINTERS

- Do not require employees to disclose the existence of a disability or the use of medications
- Do not preclude the use of any prescription drugs that may hypothetically increase the “potential” for accidents, absenteeism, or substandard performance

# Prescription Drugs: Common Pitfalls

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**PITFALL:** Punishing employees who enter rehabilitation programs (either for prescription or illicit drug usage)

# Prescription Drugs: Common Pitfalls

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## KEY PRACTICE POINTERS

- Grant leave for employees to participate in rehabilitation programs
- Consider ADA/FEHA implications once they return to work
  - Past drug/alcohol addiction = disability protected under ADA/FEHA
  - Current illegal drug use/past casual drug use ≠ protected under ADA/FEHA





# **Closing Thoughts/Tips**

# Closing Thoughts/Tips – “DOs”

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- Include policy language carving out exceptions for use of lawfully-prescribed medications
- Document reasonable suspicion observations
- Establish a clear policy for when you will require drug or alcohol testing
- Grant leave for employees to attend rehab
- Make clear that medical marijuana use (at the worksite) constitutes a policy violation
- Acknowledge testing exceptions for transportation and other “safety-sensitive” positions
- Reference your drug and alcohol policy in your EAP

# Closing Thoughts/Tips – “DON'Ts”

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- Lump together (legal) prescription medication use with illicit drug use
- Overstate rationale for discipline following positive drug or alcohol test
- Use random drug testing (with limited exceptions)
- Punish employees who enter rehabilitation programs
- Discriminate against (or fail to accommodate) employees based on their underlying medical conditions, regardless of their use of medical marijuana

**Questions?**



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