

# DRUGS: THE GOOD, THE BAD AND THE LEGAL

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# LEGAL DISCLAIMER

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with legal counsel for individual responses to questions or concerns regarding any given situation.

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# ARE THEY LEGAL?

- ▶ Cocaine, heroin, methamphetamines, and other synthetic drugs.
- ▶ MDMA (ecstasy/molly) & LSD.
  - Limited use for “medical necessity.”
- ▶ In 2020, the state passed a ballot measure to decriminalize possession of psilocybin.

# MARIJUANA, IS IT LEGAL?

- ▶ Federally – remains illegal.
- ▶ California –
  - Medical - Accommodation of medical marijuana use is not required on the property or premises of any place of employment or during the hours of employment.
  - Recreational - No longer illegal as of 2016, but employers can prohibit recreational use during work hours and on company property.

# PRESCRIPTION MEDICATION, IS IT LEGAL?

- ▶ Employers can require proof of a valid prescription for any prescription medication used while performing work.
- ▶ Reserve the right to require medical verification of the effect a prescription drug or medicine will have on an employee's ability to perform their job.
- ▶ Employers must engage in the interactive process to accommodate an employee taking medication which can affect the ability to perform the job safely.
- ▶ All medical information must be kept confidential, except as necessary to ensure safety concerns.

# OVER-THE-COUNTER MEDICATION, IS IT LEGAL?

- ▶ Engaging in the use of prescribed or over-the-counter medication in a manner violating the recommended dosage or instructions from the doctor **during work hours or in a manner which effects their ability to safely perform their work duties.**

# DRUG FREE WORKPLACE POLICIES

# SMOKE-FREE WORKPLACE POLICIES

- ▶ Smoking is not allowed in company buildings or work areas at any time. “Smoking” includes the use of any tobacco products (including chewing tobacco), electronic smoking devices, and e-cigarettes.



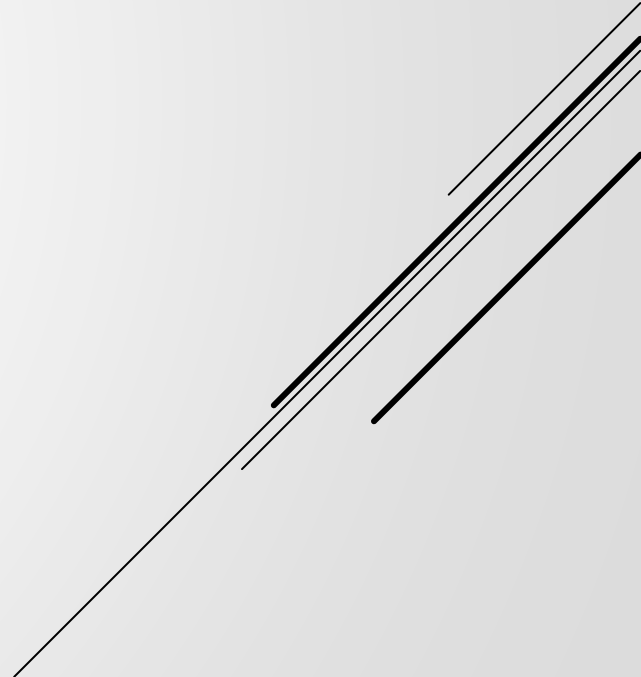
# FEDERAL

- ▶ Drug-Free Workplace Act of 1988.
- ▶ If you enter into a federal contract for the procurement of property or services valued at \$100,000 or more, or if you receive any federal grant, you must follow the federal regulations.

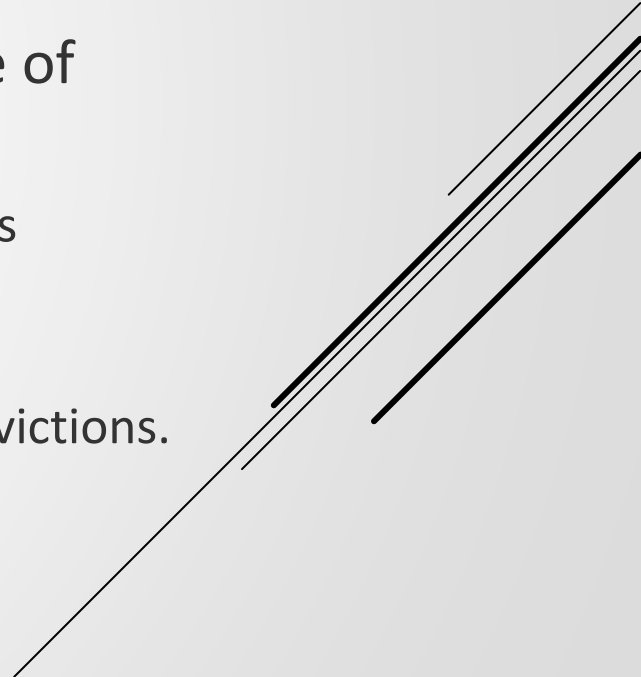
# CALIFORNIA

- ▶ California's Drug-free Workplace Act of 1990: certification of a drug-free workplace required if you contract with the state or receive grants from the state.
- ▶ Employers may have a drug-free workplace policy:
  - Employers may prohibit the unlawful use, possession, purchase, sale, distribution, or being under the influence of any illegal drug and/or the misuse of legal drugs while on company or client premises or while performing services for the company.
  - Employers may prohibit reporting to work or performing services under the influence of alcohol or consuming alcohol while on duty or during work hours.

# COMMON QUESTIONS

- ▶ What information can I gather from applicants before offering the job?
  - ▶ How can I screen for a “drug user?”
  - ▶ If I find out they use illegal drugs can I fire them?
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# SENATE BILL 700

- ▶ Effective January 1, 2024.
  - ▶ Amends California Government Code / Fair Employment and Housing Act (FEHA).
  - ▶ It is unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis.
    - In some cases there may be a limited exceptions where information is obtained from criminal history.
    - Employers should be familiar with the Fair Chance Act and amended regulations regarding the legal and proper consideration of prior convictions.
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# TYPES OF DRUG TESTING

- ▶ Testing to ensure compliance with a drug-free workplace policy:
  - Pre-Employment;
  - Reasonable Suspicion;
  - Random;
  - Post accident.
- ▶ Under some circumstances, refusal to test or a positive test may be a terminable offense, resulting in denial of unemployment and/or workers' compensation benefits.

# PRE-EMPLOYMENT TESTING

- ▶ California law allows an employer to require a "suspicionless" drug test as a condition of employment after a job offer is tendered but before the employee begins working.
- ▶ 2008 California Supreme Court ruling in *Ross v. RagingWire Telecomms, Inc.* that employers may drug test employees for marijuana and terminate their employment if the employee fails the test.
- ▶ 2024 – Amendment to Fair Employment and Housing Act limiting the use of positive tests showing non-psychoactive cannabis metabolites.

# PRE-EMPLOYMENT TESTING LIMITATIONS

- ▶ It is unlawful for an employer to discriminate in hiring or any term or condition of employment based upon the **person's use (or perceived use)** of cannabis off the job and away from the workplace or positive drug screening test has found **non-psychoactive cannabis metabolites** in their urine, hair, or bodily fluids.
- ▶ Such metabolites show recent cannabis use, but do not necessarily establish current impairment.
  - *Tetrahydrocannabinol (THC)*

# TESTING LIMITATIONS

▶ There are a few exceptions:

- 1) These protections do not apply to employees in building or construction trades;
- 2) These protections do not apply to employees in positions requiring federal background investigations and clearance;
- 3) The protection do not preempt state and federal laws requiring testing for controlled substances (including cannabis) such as laws covering licensing, DOT drivers, federal contracts and federal funding requirements.



# REASONABLE SUSPICION TESTING

- ▶ Upon reasonable suspicion that the employee is under the influence of alcohol or drugs that could affect or has adversely affected the employee's job performance.
- ▶ "Reasonable suspicion" means objective symptoms, such as factors related to the employee's appearance, behavior, or speech.
  - Employers should train supervisory employees on identifying and reporting reasonable suspicion.
- ▶ Compliance can be a condition of employment.
- ▶ Employees who test positive or who refuse to submit to substance abuse screening may be subject to termination.

# REASONABLE SUSPICION TESTING LIMITATIONS

- ▶ Unlawful for an employer to discriminate against a person in termination, or any term or condition of employment, or otherwise penalize a person, based upon the person's use of cannabis off the job and away from the workplace or based on an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

# RANDOM TESTING

- ▶ Limited to safety sensitive positions and as otherwise authorized or required by federal or state law.
  - Department of Transportation federal required random testing.
  - Federal Motor Carrier Safety Administration (FMCSA) Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse).

# POST ACCIDENT TESTING

- ▶ Only where there is reasonable suspicion that the individual's consumption or intoxication caused by drugs or alcohol contributed to the accident.

# LIMITATIONS & METHODS FOR COMPLIANCE



# TESTING LIMITATIONS

- ▶ Must not be discriminatory.
- ▶ Must not be unnecessarily intrusive in the employee's right to privacy.
- ▶ The cost must be covered by the employer.

# METHODS FOR COMPLIANCE

- ▶ As of January 1, 2024: Ensure testing for THC levels rather than metabolites or consider ceasing testing.
- ▶ Training supervisory employees on the signs of cannabis impairment for purposes of “reasonable suspicion” testing, keep training updated and maintain all certificates.
- ▶ Document reasonable suspicion.
- ▶ Pay for all testing.

# ACCOMMODATIONS





# AMERICANS WITH DISABILITIES ACT

- ▶ Under certain circumstances drug addiction is considered a disability under the ADA.
  - If it would pose a substantial limitation on one or more major life activities.
- ▶ Alcohol use disorder is a disability and is protected by the ADA if he or she is otherwise qualified to perform the essential functions of the job.
- ▶ However, an employer can discipline, discharge or deny employment to such an individual whose use of drugs or alcohol adversely affects job performance or conduct.

# DRUG AND ALCOHOL REHABILITATION

- ▶ Employers of 25 or more employees.
- ▶ Reasonably accommodate an employee who wishes to voluntarily enter and participate in a rehab program with an unpaid leave of absence.
- ▶ Employer can require employee to maintain workplace standards.
- ▶ Employee can use available sick leave.

# THANK YOU!

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