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Business Lawyers for Business Owners

Prop 64: Marijuana in the Workplace

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Introduction

- ▶ History of Workplace Drug Laws
- ▶ Drug-Free Workplace Policy Best Practices
- ▶ Elements of a Drug Testing Program
- ▶ Implications of Marijuana Legalization
- ▶ Employee Addiction Treatment Issues

History of Drug Testing

- ▶ **Executive Order 12564**, which imposed upon federal employees the requirement to refrain from using illegal drugs, *on or off-duty*, as a condition of federal employment
- ▶ **Drug-Free Workplace Act of 1988**
- ▶ **California's Constitutional Privacy provision**
- ▶ ***Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1***
- ▶ **Case Law** develops under federal and State law

Legal Challenges, Hurdles, Pitfalls

- ▶ Invasion of Privacy
- ▶ ADA
 - ▶ Voluntary disclosure
 - ▶ Prior drug use or abuse v. current use
- ▶ Legal Off-Duty Conduct

California's Compassionate Use Act of 1996

- ▶ Seriously ill persons can buy and use medical marijuana upon the receipt of a physician's recommendation
- ▶ Includes treatment of: cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, "or any other illness for which marijuana provides relief"
- ▶ Conditions could be "disability" under State and federal disabilities laws

Federal Law: Controlled Substances Act

- ▶ Marijuana Remains a Schedule I Narcotic
 - ▶ Manufacture, sale, distribution, possession are still prohibited under federal law
 - ▶ No DEA-certified doctor may prescribe marijuana

Ross v. Raging Wire (CA Supreme Court 2008)

- ▶ Applicant for employment tested positive for marijuana, used marijuana for medical reasons
- ▶ Evaluated on premises v. off premises use
- ▶ Court held that employers do not have to accommodate on or off premises use
- ▶ Prop 64 “codifies” *Ross v. Raging Wire*

New OSHA Rules

- ▶ Post-Accident Testing Policy
- ▶ Covered persons will be drug/alcohol tested if the following conditions occur:
 - ▶ (A) there is a reasonable possibility that drug/alcohol use may have been a contributing factor to the reported injury or accident, and
 - ▶ (B) the injury or accident resulted in medical treatment beyond first aid, or in property damage in any amount.
- ▶ Drug testing is applied neutral fashion, to foster a safe work environment, and only to identify drug/alcohol use in the recent past. Testing will be not be undertaken to retaliate against employees for reporting workplace injuries.

“Off Duty Conduct” Conundrum

- ▶ Labor Code 96(k): Employer cannot take adverse action against employee for “lawful off-duty conduct
- ▶ Specific exception contained in Prop 64

ADA Considerations for Medical Marijuana Users

- ▶ No duty to accommodate illegal drug use
- ▶ But: recovered addict protections
- ▶ Possible: FMLA or other leave appropriate for underlying medical condition
- ▶ California Labor Code 1025: rehab leave for 25+ employers
- ▶ EAP – Voluntary referral or as an alternative to disciplinary process (prior to violation of policy)

Prop 64: What Have We Done?

- ▶ Proposition 64: The “Control, Regulate and Tax Adult Use of Marijuana Act”
- ▶ Legalizes recreational use
- ▶ Creates a Bureau of Marijuana Control
- ▶ Allows employers to enact and enforce workplace policies
- ▶ Does not require workplace “accommodation” (other than existing Labor Code provisions)

Prop 64 and the Workplace

- ▶ No legal protection for use, possession or intoxication at work.
- ▶ Prop 64 expressly allows employers to enforce their drug-free workplace policies:
- ▶ CA Health & Safety Code § 11362.7-11362.83:
 - ▶ “Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment...”

Different Effects on Different Employers

- ▶ Highly-regulated industry?
- ▶ Difference between regular and “safety sensitive” positions
- ▶ Specific effects of drug use on certain positions
- ▶ Individual problems that certain companies want or need to solve?
- ▶ Does every employee need to be tested?
- ▶ Does every employee need to be prohibited?

Hypothetical

- ▶ James Reefer comes to work with red eyes and smells like marijuana
 - ▶ Can you send Reefer for drug testing?
 - ▶ What if he tells you he will fail because he is using medical marijuana with physician authorization
 - ▶ What if he tells you he smoked pot legally on a weekend

What is Reasonable Suspicion?

BEHAVIOR

- stumbled, clumsy, uncoordinated
- Drowsy, sleepy, lethargic
- Agitated, anxious, restless
- Hostile
- Unresponsive, distracted, withdrawn
- Tremors, shakes
- Suspicious, paranoid
- Hyperactive, fidgety
- Inappropriate, uninhibited behavior
- Frequent use of mints, mouthwash, breath sprays, eye drops

APPEARANCE

- flushed complexion
- Sweating
- Unkempt grooming
- Bloodshot eyes
- Tearing, watery eyes
- Dilated (large) pupils
- Constricted (pinpoint) pupils
- Unfocused blank stare
- Disheveled clothing

SPEECH

- Slurred, thick
- Incoherent
- Exaggerated enunciation
- Loud, boisterous
- Cursing, inappropriate speech
- Excessively talkative
- Nonsensical, silly

BODY ODOR

- Alcohol
- marijuana

Effective Drug-Free Workplace Policy

- ▶ Confronts/Addresses Prop 64
- ▶ Specifically communicates federal law (Controlled Substances Act)
- ▶ Specifies that “working under the influence” is not required for violation of the policy
 - ▶ Prohibit “any detectable level of illegal (or legal) controlled substance”
- ▶ Specifies which employees are covered?
- ▶ Identifies testing “triggers”
- ▶ Specifies EAP provisions

Elements of a Drug Testing Program

- ▶ Drug Free Workplace Policy
- ▶ Supervisor Training
- ▶ Employee Education
- ▶ Drug Testing
- ▶ Employee Assistance

Elements of a Drug Testing Program

- ▶ Supervisor Training
 - ▶ Elements of the policy
 - ▶ Conduct to be observed
 - ▶ Confidentiality
 - ▶ Reasonable suspicion
 - ▶ Post accident
- ▶ Employee Education

Elements of a Drug Testing Program

- ▶ Drug Free Workplace Policy
 - ▶ Tailored to the company's specific needs
 - ▶ Effectively communicated to employees, and containing the following information
 - ▶ Purpose of policy
 - ▶ Description of prohibited behaviors
 - ▶ Consequences of violating the policy
 - ▶ Confidentiality
 - ▶ EAP Information

Types of Drug Testing

When to Drug Test

- Pre-Employment
- Random
- Post Accident
- Worker's Comp
- For Cause/Suspicion

Drug Testing Methods

- ▶ Blood
- ▶ Saliva
- ▶ Urine
- ▶ Hair
- ▶ Lab or On-site

Immediate Steps

- ▶ Review and revise policies
 - ▶ Emphasize that prop 64 has no effect on your policy
 - ▶ Drug testing
 - ▶ Zero tolerance
- ▶ Train supervisors
- ▶ Communicate with employees

Sample Policy Communication

The Company complies with both State and federal laws. Where State and federal law differ, the company will comply with the stricter of the two provisions. California now permits the specified use and possession of marijuana for medical and/or non-medical purposes. Federal law does not. The Company considers marijuana to be an illegal drug for purposes of its Drug Free Workplace and drug testing policies – even those that allow for medical and/or non-medical use under California law.

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