

Impact of Marijuana Legalization on Employer Drug Policy and Testing Program

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Prop 64

(Recreational use of Marijuana)

- *Nothing in section 113 62.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:*
 - *(f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.*

Prop 64

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- *(g) The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 within a building owned, leased, or occupied by the state or local government agency.*
- *(h) The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 113 62.1 on the individual's or entity's privately owned property.*

Medical Marijuana

- Ross v. RagingWire Telecommunications
 - the California Supreme Court held that employers are not required to accommodate an employee's medicinal marijuana use irrespective of the Compassionate Use Act of 1996.

Increase In Positive Rates

- Since 2016 when recreational marijuana was legalized, the following states saw the largest marijuana positive increases:
- Non-DOT:
 - Nevada – 43% increase
 - Massachusetts – 14% increase
 - California – 11% increase
- DOT:
 - Nevada – 39% increase
 - California – 20% increase
 - Massachusetts – 11% increase

Lessons from Colorado

- Marijuana use in Colorado = 16% vs. 8.6% for national avg.
- In a 2017 poll 48% of people who used marijuana recreationally reported going to work high and 39% said they went to work high on a weekly basis.
- Hospital visits due to marijuana use increased by 52% from 2012 to 2016.
- Traffic accidents related to marijuana use increased from 11.43% in 2013 to 21.3% in 2017.
- Traffic deaths with drivers who tested positive for marijuana increased by 39% during the past four years, which equates to one person killed every 2.5 days.

Common Questions

- With marijuana legal in California for recreational use, should we consider removing it from our drug testing panel?

Common Questions

- As an employer in a state where recreational and/or medical marijuana is legal, we continue to test for marijuana. How can we prevent employees from challenging their termination?
 - Courts have consistently ruled in favor of employers:
 1. Have a sound drug/alcohol testing policy.
 2. Regularly make their employees aware of the policy.
 3. Enforce the policy consistently.
 4. Have a drug testing program to deter employee drug use.

Policy

Purpose (full section)

The purpose of this document is to state the policy of [Company Name] regarding the **use and/or abuse** of drugs and alcohol by employees and contractors.

[Company Name] recognizes that its continued success is dependent upon the physical and mental health of its employees and contractors. We strive to maintain a safe, healthful and efficient working environment for all employees, contractors, and the public. [Company Name] recognizes its right to protect Company property, equipment, and operations by preventing and, when necessary, dealing with problems commonly associated with substance abuse and misuse.

Policy

To help ensure that [Company Name] accomplishes these goals, the following policy and procedures concerning the use of and testing for alcohol and drugs will apply to [Company Name] employees and contractors. All employees and contractors must be aware that [Company Name]'s policy applies to them and they are subject to all of its provisions.

[Company Name] maintains an Employee Assistance Program which provides referral information to employees who wish to seek help with alcohol or drug abuse. Employees are financially responsible for their own care and treatment.

With these objectives in mind, [Company Name] (hereafter referred to as "Company") has established the following policy and procedures.

Policy

Scope (partial section)

This policy applies to **all** final candidates with conditional job offers for employment, including, but not limited to, temporary employees, part-time employees and regular full-time employees. Each final candidate for employment agrees to comply with this policy if he or she is offered employment by the Company. Each employee agrees to comply with this policy by his or her continued employment with the Company.

Policy

Definition (partial section)

“Controlled Substances” and **“Drugs”** when referred to in this policy means and includes all substances and/or medications that can affect one or more mental and/or physical functions (e.g. coordination, reflexes, vision, mental capacity or judgment, etc.). The words "controlled substances" and/or "drugs" includes all chemical substances or drugs listed in any controlled substances acts or regulations applicable under any **federal, state or local laws**, as well as Synthetic or “Designer” drugs. They also include legal substances including alcohol, prescription drugs and/or over-the-counter drugs as such drugs also may affect the employee's performance of his/her job.

Policy

- Please note following paragraph is very important:
- The [Company Name] Drug, Alcohol and Contraband Control policy does not recognize the use of marijuana (cannabinoids), even when allowable under state laws, to be a valid explanation for an employee's positive drug test result.
- Discussion: The US Federal Control Substance Act maintains Marijuana as a Schedule I drug. What does this classification mean?

Refusal of Testing or Rehabilitation

- “Refusal of Testing and/or Rehabilitation” when referred to in this policy means refusing to submit to testing and/or rehabilitation program or refusing to cooperate in the testing process and will have the same disciplinary result as a positive test result or failing the drug test. Refusing to cooperate in the testing process will also include failing to produce a urine specimen within the two/three (2-3) hour time period.

Contraband and Contraband Inspections

- When referred to in this policy means the Company may conduct unannounced inspections for illegal drugs, alcohol, firearms, weapons, explosives or any other item classified as “contraband” by the Company in Company facilities, property, job sites or areas of work. The Company also reserves the right to utilize “**scent trained canines**” during a contraband inspection.
- Inspections of employees and their personal property including personal vehicles, lockers, lunch packs, etc., may be conducted when circumstances or workplace conditions justify same or there is reasonable suspicion to believe that the employee or employees are in violation of this Policy.
- Inspections of Company property, facilities or work areas can be conducted at any time and do not have to be based on reasonable suspicion.

Contraband and Contraband Inspections

- Inspections of employees and their personal property may be otherwise conducted when circumstances or workplace conditions justify them or when client, customer or contract requires same.
- An employee's consent to an inspection is required as a condition of employment and the employee's refusal to consent may result in disciplinary action, including termination, even for the first refusal.
 - **Discussion Points:**
 - Scent trained K-9 use.
 - Possession, providing, sales in the workplace is very likely to increase. Its safer to deal at work!
 - Other states that have legalized marijuana have experienced this increase.
 - After marijuana was decriminalized in Colorado, the number of positive workplace drug tests increased by 20% between 2012 and 2013, compared to a national average increase of five percent.
 - As I have said for many years....when a drug becomes legal to use, there will be increased social acceptance, which always increases the number of users and these users need a job.

Drug & Alcohol Testing Classifications

- Final Candidate (aka pre-employment)
- Post-Incident:
 - Vehicle
 - Injury
 - OSHA requirements
 - Property Damage
- Pre-Assignment
- Return-To-Duty
- Random (Safety Sensitive Classification Only)
 - Industry standards
 - Contractual obligations
- Unannounced (Safety Sensitive Classification Only)
- Reasonable Suspicion (must be trained)
- Post-Treatment

Prohibited Activities

- Narcotics, Illegal Drugs, Controlled Substances or Items of Contraband
- Misuse of Legal Drugs
- Alcohol or Intoxicating Beverages
- Reporting to Work While Under the Influence
- Failure to Cooperate During Searches, Investigations and Testing

Employee Assistance Program (EAP)

- Voluntary Surrender
- Employee Qualifies for “Second Chance”
 - Second Chance Criteria
- What about Re-Hire/Allowed to Re-Apply?

Drug & Alcohol Testing Guidelines

- Urine Testing:
 - Discuss
 - Panel members
 - Thresholds
 - DOT vs. Non-Regulated Testing Issues
- Breath alcohol Testing vs Urine Alcohol Testing
- On-site vs Sending Employees to Collection Site

Communication and Training

- Employee
 - Copy of policy and any changes or revisions
 - Instruction concerning the dangers associated with drugs and alcohol
 - Note: Top Ten Misperceptions About Marijuana (see DATIA handout)
- Supervisor
 - Policy orientation
 - Reasonable Suspicion
 - Course length (best practice per course content) 3-4 hour course.
 - Re-Train (best practice) is 3-4 years.
 - Conduct immediate remedial training if supervisor failed to perform per current policy.

Policy/Program Enforcement

- 1) Just follow your policy, keep an open mind and stay attentive.
 - Consistency is key.

Policy/Program Audit

- Self-Audit
- ZCA/CCS provides this service.

Questions?