

*Tripping' Out: Drugs & Alcohol
in the Workplace*
Breakout Ten


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Agenda

- Drug & Alcohol Testing in CA
 - Random Drug Testing
 - Reasonable Suspicion Testing
 - Other Testing Situations
- Emerging Issues
 - Testing for Prescription Drugs
 - Reasonable Accommodation
 - Marijuana
- Conclusion



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Disturbing Statistics

- Drug use in the workplace costs employers billions of dollars every year in lost productivity, increased health problems, and workplace accidents.
- 80% of drug abusers steal from their workplace to support their drug use.
 - National Drug Free Workplace Alliance
- Marijuana users have 85% more work-related injuries and 78% greater work absenteeism, and their chances of industrial accidents are increased by 55%.
 - National Institute on Drug Abuse

aa/rr 2

Random Drug Testing

- *Smith v. Fresno Irrigation District* (1999) 71 CalApp4th 147
 - Factors
 - Program announced substantially before implementation
 - Before implementation, employee may receive counseling or treatment without fear of reprisal
 - Testing applied to safety sensitive position
 - Tested in least intrusive manner

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Random Drug Testing (Continued)

- Safety Sensitive Positions
 - *Skinner v. Railway Labor Executives' Ass'n* (1989) 489 U.S. 602

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Random Drug Testing (Continued)

- Reasonable Suspicion Factors
 - Observable phenomena
 - Pattern of abnormal conduct or erratic behavior
 - Drug-related arrest or conviction
 - Information for credible resources
 - Evidence of tampering
- *American Fed'n Gov't Employees, AFL-CIO Local 2391 v. Martin* (9th Cir. 1992)

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Summary of Testing Methods

- Post-Offer, Pre-Employment Testing
- Reasonable Belief
- Return-to-Duty / Follow-Up Testing
- Post-Accident Testing
- Random Testing for Safety Sensitive Positions

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Exceptions

State drug testing law may be preempted where federal law requires drug testing

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Drug Free Workplace Acts

Federal

- Applies to:
 - Procurement contracts \$100,000+
 - Federal grant recipients

California

- Applies to:
 - State contractors, regardless of \$ amount




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Drug Free Workplace Acts

Steps

1. Post statement
2. Provide statement to employees
3. Establish drug-free awareness program
4. Employees to notify of drug conviction
5. Notify contracting agency of conviction
6. Sanction employee for conviction
7. Commit good faith effort to implement steps

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• Emerging Issues

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Testing for Prescription Drugs

Bates v. Dura Automotive Sys. (6th Cir. 2014)
767 F3d 566 – “Job-related and consistent with business necessity”

Best Practices...

Limit to safety sensitive positions	Treat employees who test positive consistently
Keep results private to extent possible	Don't ask about underlying medical conditions

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Alcohol or Drug Use – Reasonable Accommodation

Under certain circumstances, employers are required to offer leave to participate in rehabilitation for drug or alcohol

- Labor Code § 1025 - current user of alcohol not protected
- FEHA does not offer protections for current drug or alcohol use
- Hold an alcoholic employee to same standards as other employees
 - *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1162

aalrr 12


Drug Testing Methodology



- Saliva Tests
 - DHHS Mandatory Guidelines
 - Limitations
- Chain of Custody
 - *Edgerton v. State Personnel Bd. (Dep't of Transp.)* (2000) 83 Cal.App. 1350
 - Violation may not automatically invalidate drug test

aalrr 13

Marijuana Use in the Workplace




- Medical Marijuana
- Proposition 64

aalrr 14

Medical Marijuana in California


- CA was the first state to legalize medical marijuana in 1996.
- Compassionate Use Act authorizes medical marijuana use for any physician-approved condition.
 - Cal. Health & Safety Code § 11362.5(b)
- Intended to ensure that patients and their primary caregivers are not subject to criminal prosecution or sanction. (§ 11362.5(b).)



aalrr 15

Medical Marijuana in California (Continued)

- Employers not required to accommodate medical marijuana use on employer property or premises or during working hours.
 - Cal. Health & Safety Code § 11362.785(a)
- Not a violation of public policy or FEHA to dismiss an employee from employment because of having tested positive for a chemical found in marijuana.
 - *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008)



aalrr 16


Inconsistent Policies

- Workplace policies should avoid creating an "implied agreement" not to discipline or terminate for marijuana use
- *Justin Shepherd v. Kohl's Department Stores, Inc.* (E.D. Cal 2016) 2016 WL 4126705

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San Francisco Ordinance

- Drug and alcohol testing prohibited unless employer has *“reasonable grounds to believe the employee’s faculties are impaired on the job”*



aalrr 18

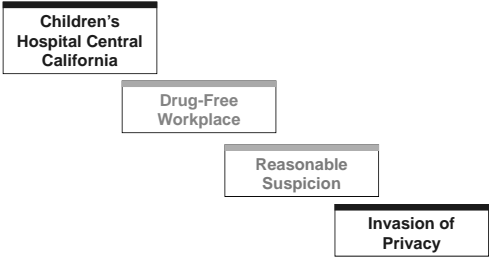
OSHA – Regulating Injury & Illness Reporting Standards

- New rule published October 19, 2016
- Limited to federal OSHA jurisdiction
- Cal-OSHA – state plan
- Will it be overturned by new administration?



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Million Dollar Verdict




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aalrr 22
