Newest Developments in Workplace Drug and Alcohol Laws

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I. INTRODUCTION

The rules governing drug testing for public employers in California represent a confluence of constitutional, discrimination, health and safety, and criminal law. As a general rule, nearly all public employers in the state of California must certify that they provide a drug-free workplace[1] and most must also follow the regulations of the Federal Drug Free Workplace Act of 1988.[2] While it would appear as though this is a simple directive for employers – ensure that your employees are not impaired by drugs or alcohol at work – employers' efforts to comply are complicated by, among other things, (i) inconsistencies in the treatment of marijuana under state and federal law, (ii) the need to balance their interest in ensuring a drug-free workplace with employees' constitutional right to privacy, and (iii) the treatment of certain types of drug use under state and federal anti-discrimination laws.

The purpose of this paper is to provide guidance to public employers to help them navigate the various laws that must be considered when developing and implementing workplace drug and alcohol policies. Specifically, the below discussion focuses on the complications faced by employers related to marijuana usage by employees and, more generally, the rules related to drug and alcohol testing considering the limitations dictated by both state and federal (i) constitutional protections and (ii) disability discrimination laws.

II. IMPACT OF CALIFORNIA MARIJUANA STATUTES ON EMPLOYER DRUG POLICIES

A. *MEDICAL MARIJUANA*

Use of marijuana for medicinal use has been permissible in California for over twenty years, since the passage of the Compassionate Use Act of 1996. The Compassionate Use Act of 1996, among other things, amended the California Health and Safety Code to decriminalize the cultivation, possession, and use of marijuana by patients suffering from certain serious medical conditions upon the recommendation of a licensed physician.[3] The law protects patients and their primary caregivers from criminal prosecution and penalties for possessing (i) up to 8 ounces of dried marijuana and (ii) up to 6 mature or 12 immature marijuana plants.[4] Physicians who prescribe medical marijuana are also protected from both criminal prosecution and from losing their medical license or other privileges as a result of recommending medical

[1] Cal. Gov. Code §§ 8350, et seq. (requiring employers who contract with or receive grants from the State of California to certify that they provide a drug-free workplace).

[2] 41 U.S.C. Ch. 81 (requiring employers who enter into a federal contract for the procurement of property or services valued at $100,000 or more, or who receive a federal grant, to follow the regulations of the Drug-Free Workplace Act of 1988).

[3] Cal. Health & Safety Code §11362.5

[4] Cal. Health & Safety Code §11362.77(a)

marijuana use.[5] Courts have interpreted this provision of the Health and Safety Code as permitting qualified patients to possess an amount of marijuana that is "reasonably related to [their] current medical needs."[6]

One apparent hole in the state's medical marijuana legislation is that the Compassionate Use Act of 1996, as originally adopted and implemented by the State legislature, was silent as to any employment law impacts. Specifically, it neither required employers to accommodate the use of medical marijuana in the workplace, nor did it explicitly exempt employers from such accommodation. In an attempt to clarify the rules around the use of medical marijuana, the California legislature enacted further legislation in 2003. Part of this legislation – the Medical Marijuana Program Act[7] - explicitly provided that medical marijuana need not be accommodated *in the workplace or during work hours*.[8]

However, it did not address whether employers were required to accommodate off-site or off-hours medical marijuana usage. In what remains the seminal case on this issue in California, the California Supreme Court held in *Ross v. RagingWire Telecommunications*[9] that employers *are not* obligated to hire employees who test positive for marijuana usage, regardless of when and where they actually used the marijuana or if they were legally prescribed the drug. Specifically, the Court in *RagingWire* was asked to determine whether an employer violated the California Fair Employment and Housing Act ("FEHA") by failing to accommodate a job applicant's off-work medical marijuana usage. The job applicant suffered from chronic pain for which he was prescribed medical marijuana. Following a conditional employment offer, the plaintiff was directed to take a pre-employment drug test and disclosed his medical marijuana usage to the testing agency. When the test came back positive, his conditional employment offer was revoked and the plaintiff sued alleging, among other things, violations of the anti-discrimination and reasonable accommodation provisions of FEHA. The Court found that the Compassionate Use Act of 1996 did not give marijuana the status of other legally prescribed drugs given that it remained (and remains) illegal under federal law. Accordingly, and consistent with precedent,[10] the Court held that employers do not violate FEHA by failing to hire individuals who test positive for marijuana usage, even if that usage is permissible under the Compassionate Use Act of 1996.

A more recent case interpreting FEHA and the Compassionate Use Act of 1996, *Shepherd v. Kohl's Department Stores, Inc.*,[11] relied on the holding in *RagingWire* in dismissing a series of alleged FEHA violations stemming from Kohl's decision to terminate the employment of an individual who tested positive for marijuana but who was using it pursuant to the Compassionate Use Act of 1996. In *Kohl's*, the plaintiff was using medical marijuana to treat an anxiety disorder but had not disclosed his medical marijuana use to his employer. He suffered a back injury at work and was sent to the worker's compensation doctor for Kohl's, who, for reasons that are not fully discussed in the Court's opinion, ran a drug screen on the plaintiff. The plaintiff's test included a positive result for marijuana metabolites and he was fired.

The plaintiff sued Kohl's for alleged violations of FEHA, defamation and breach of implied contract. The Court allowed these latter two claims to move forward.[12] The plaintiff's defamation claim was based on

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[5] Cal. Health & Safety Code §11362.5(c)

[6] *People v. Trippert* (1997) 56 Cal.App.4th 1532, 1549.

[7] Cal. Health & Safety Code §§11362.7-11362.83.

[8] Cal. Health & Safety Code §11362.785(a).

[9] *Ross v. RagingWire*, (2008) 42 Cal.4th 920.

[10] *Id*. at 926-928 (citing *Loder v. City of Glendale* (1997) 14 Cal.4th 846).

[11] *Shepherd v. Kohl's Dept. Stores* (E.D. Cal. Aug. 2, 2016) 2016 WL 4126705, *4.

[12] The plaintiff's claim of breach of implied contract and the covenant of good faith and fair dealing is not particularly relevant in the public employment context. The vast majority of public employees are covered by collective

the statement in his notice of termination that he was fired, in part, because he was under the influence of marijuana at work and used, consumed or sold marijuana on company property.[13] The employee alleged, contrary to the statement in his notice of termination, Kohl's had no evidence that he actually used marijuana on Kohl's property or was under the influence at work.[14] Kohl's only evidence of his marijuana usage was a positive drug test, and the plaintiff offered evidence that marijuana metabolites can remain in one's system for up to thirty (30) days after use, even though that individual would no longer be impaired by the drug.[15] The parties in *Kohl's* jointly agreed to dismiss the lawsuit,[16] with prejudice, so the question of whether an employer who is not sufficiently precise in, or otherwise overstates, the rationale for terminating the employment of an individual who tests positive for marijuana may be held liable for defamation remains open. The best way for an employer to avoid a potential defamation claim is to use precise language in any disciplinary document and, specifically, not overstate the evidence supporting discipline (e.g. if the only evidence of drug usage is a positive drug test, do not conclusively state in the disciplinary documentation that the employee was using drugs at work).

B. Recreational Marijuana

In November 2016, voters in the California approved Proposition 64, also known as the Adult Use of Marijuana Act (the "AUMA"), which legalized the use, licensed growth, distribution and sale of recreational marijuana. The usage provisions of the AUMA took effect almost immediately while the growth, distribution, and sale provisions were to take effect no later than January 1, 2018. Under the AUMA, it is legal for a person aged 21 or older to (i) possess and use up to one ounce of marijuana and (ii) smoke marijuana in private homes and licensed businesses. The AUMA also provided extensive regulation on the cultivation, distribution, sale and use of marijuana.

Apparently learning from experience with the Compassionate Use Act of 1996, the AUMA explicitly does not restrict employers from maintaining drug-free workplace nor does it require employers to make accommodation for employee recreational marijuana use. The relevant portion of the AUMA states:

> Nothing in [this law] 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."[17]

For this reason, the AUMA does not represent a significant legal change for employers. Employers still have the ability to drug test applicants and employees, subject to certain limitations described below and are still permitted – and generally required – to maintain drug-free workplace policies. This is particularly

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bargaining agreements, meaning there are few situations in which the parties would resort to looking to an "implied contract." Accordingly, we have not discussed this claim here.

[13] *Shepherd*, *supra*, at *10.

[14] *Ibid.*

[15] *Ibid.*

[16] Case No. 14-cv-01901 (E.D. Cal. October 4, 2016).

[17] Cal. Health & Safety Code, §11362.45.

important for employers who receive federal funding or who have employees that are subject to federal Department of Transportation (the "DOT") drug testing requirements, as marijuana remains a controlled substance under federal law.

C. *Legislative Efforts Related to Reasonable Accommodation*

Since the passage of the AUMA, legislators in California have renewed attempts to expand protections for employees who use marijuana, particularly for medical purposes. Most recently, Assembly Bill 2069, which was introduced in February 2018, would have "prohibit[ed] an employer from engaging in employment discrimination against a person on the basis of his or her status as, or positive drug test for cannabis by, a qualified patient or person with an identification card."[18] The bill was subsequently amended to provide for the "reasonable accommodation" of medical marijuana under FEHA, including engagement in the interactive process.[19]

In an effort to avoid a conflict with federal law, the bill included a carve-out that would have allowed employers to "refus[e] to hire an individual or discharge[e] an employee who is a qualified patient or person with an identification card, as those terms are defined in Section 11362.7 of the Health and Safety Code, if hiring the individual or failing to discharge the employee would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations." This provision, presumably, would have allowed employers who are subject to federal drug-free workplace laws – including most public employers – to maintain and enforce those policies. AB 2069 also would have allowed employers to "terminat[e] the employment of, or tak[e] other corrective action against, an employee who is impaired on the property or premises of the place of employment or during the hours of employment because of the use of cannabis." The bill appears to have been shelved in May 2018 and, as of the writing of this paper, has not become law.

D. *Practical Impacts of California's Marijuana Laws in the Employment Context*

As the law stands currently, employers in California are not obligated to hire individuals who test positive for marijuana, nor are they obligated to accommodate such usage by current employees, even when the applicant or employee's marijuana usage is permissible under the AUMA or the Compassionate Use Act of 1996. While this appears to a bright line rule, employers nevertheless face practical difficulties in applying it.

- Imprecise Testing: Testing for marijuana metabolites is part of most standard drug screens, including those required by federal DOT regulations. However, these tests remain inexact. Though the impairing effects of marijuana may wear off within hours of its use, marijuana metabolites may remain in an individual's system for up to thirty (30) days after usage. This means that a positive test for marijuana metabolites does not necessarily establish that an employee was impaired at work. For that reason, as illustrated in the *Kohl's* case, ***it is critical that documentation related to discipline or termination precisely state the reason for said discipline and provide sufficient factual details to support discipline.***

- Consistency in Application of Drug-Free Workplace Policies: As in any other disciplinary situation, it is important that drug-free workplace policies be applied consistently. What

[18] 2017 California Assembly Bill No. 2069, California 2017-2018 Regular Session (Feb. 7, 2018).

[19] 2017 California Assembly Bill No. 2069, California 2017-2018 Regular Session (Apr. 16, 2018).

makes this particularly challenging in the context of marijuana use is that a positive drug test is not dispositive as to whether the employee was impaired at work. Therefore, by relying on drug test results, employers may face a decision about whether to discipline an employee based on their off-hours marijuana usage. This will be a particular challenge in situations in which a "good" employee has a positive drug test, but has shown no signs of impairment at work. Their supervisor may not want to discipline them – but may seek to discipline other employees for the same conduct. To the extent an employer determines not to terminate or otherwise discipline a particular employee based solely on a positive drug test without evidence of actual impairment, they will likely be obligated to apply that same standard to all employees. This, in turn, could significantly limit an employer's ability to hold employees who test positive for marijuana use accountable for violations of the employer's drug-free workplace policy. As a recommended middle ground where the only evidence of marijuana usage is a positive drug test, employers may not want to apply "zero-tolerance" policies but rather start with a lower level of discipline. This will allow the employer to hold employees accountable for violations of their drug-free workplace policies but not leave employers in a position where their only options are to do nothing or discharge the employee.

- Potential for Disability Discrimination Claims: Though this type of claim failed in *Ross v. RagingWire*, the decision in that case was limited to the facts presented there, in which the employer was not aware of the plaintiff's disability until after receiving his positive drug test results. This decision appears to leave room for employees to assert disability discrimination claims when they are able to show evidence that their termination was a result of discrimination based on their underlying disability (as defined in the FEHA) and not their marijuana usage.

- Impacts of Public Agency Policies Related to Marijuana Sales & Revenues: With the passage of Proposition 64, many public agencies view marijuana sales as a potentially significant revenue generator for their communities and are welcoming marijuana dispensaries. This public support for cannabis, and its related revenues, can pose a challenge when a public agency seeks to hold its employees accountable for marijuana use – particularly where there is no evidence that an employee is actually impaired at work.

III. Regulations Related to Applicant and Employee Drug Testing

Most public employers in California, as recipients of state and federal government funding, are required to maintain "drug free workplaces."[20] One step in ensuring compliance with these laws is implementing and maintaining a workplace drug and alcohol policy, which should include, among other provisions, a process for testing employees for illegal drugs and alcohol.

There is some tension between these legal requirements to maintain a drug-free workplace and both (i) the significant privacy rights granted to employees under the California and federal Constitutions and (ii) the protections for people suffering from disabilities under FEHA and the federal Americans with Disabilities Act (the "ADA"). To establish that a test for drugs or alcohol falls within Constitutional limits in California,

[20] 41 U.S.C. Ch. 81, *supra*, note 2; Cal. Gov. Code §§8350, et seq., *supra*, note 1.

an employer must show “(1) a significant and specific work problem traceable to substance use, (2) that testing is a reasonable means to address that problem, and (3) that no less intrusive alternative to testing is available.”[21] Accordingly, as a general rule, unless an individual is employed in a position that (i) is subject to federal Department of Transportation regulations or (ii) is “safety-sensitive,” they *cannot* be subjected to suspicion-free or random drug testing. If an employee refuses to participate in a drug or alcohol test that does not violate either state or federal constitutional law, such refusal may constitute insubordination.[22] Similar limitations apply to job applicants. California law recognizes a lesser privacy interest for job applicants than employees, but nevertheless limits pre-hire, suspicion-free drug testing to (i) positions that are subject to federal Department of Transportation rules and (ii) positions where there is a nexus between the job’s duties and the need to ensure the person engaged in those duties is not under the influence of drugs.[23] In addition, both testing and accountability measures must take into account that FEHA (i) treats drug and alcohol addiction as “disabilities” for which an employer cannot discriminate against a job applicant or employee[24] and (ii) protects the use of drugs that are lawfully prescribed and being used according to doctor’s orders but which may have an intoxicating effect on employees.

As discussed below, the rules for drug and alcohol testing are largely driven by whether or not an employee is subject to federal DOT regulations. Employers are significantly more limited in their ability to test non-DOT employees, for whom courts have held the balance weighs more heavily on protecting employee privacy rights given the nature of their work.

A. NON-DOT EMPLOYEES

The majority of public employees are not subject to federal DOT regulations, which are largely limited to individuals operating “commercial motor vehicles.”[25] In general, though the standards for reasonable suspicion testing are relatively consistent with those applicable to DOT-covered employees, the rules related to pre-hire and random testing are significantly more restrictive for employees not covered by DOT regulations, tending to place more weight on employees’ privacy interest.[26]

[21] *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 911.

[22] *Flowers v. State Personnel Board* (1985) 174 Cal.App.3d 753.

[23] *Lanier v. Woodburn* (9th Cir. 2008) 518 F.3d 1147

[24] Drug and/or alcohol addiction is considered a disability even if an individual suffering from such addiction is not currently in treatment, as long as they are not currently using illegal drugs or using alcohol at work. 42 U.S.C. §12114(a)-(b) provides that while illegal drug use is not generally protected under the ADA, if an individual “(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use,” they are protected against discrimination based on their addiction under the ADA.

[25] Commercial motor vehicles are defined as vehicles with a gross vehicle weight of at least 26,001 pounds, vehicles designed to transport 16 or more people, or vehicles that transport hazardous materials. 49 C.F.R. §382.107.

[26] Although the rules around when testing is permissible are narrower, employers often use the same measures for what constitutes a positive test for both DOT-covered and non-covered employees. Those measures are detailed below.

1. *PRE-HIRE TESTING*

a) TESTING FOR DRUGS

California law recognizes a lower privacy standard for individuals prior to hiring than for current employees and thus permits broader testing of job applicants.[27] In its decision in *Loder v. City of Glendale,* the California Supreme Court held that drug testing was permissible, even absent reasonable suspicion, for public employees who have been given a conditional offer of employment.[28] In reaching this conclusion, the Court placed significant weight on a public employer's interest in maintaining a drug-free workplace.[29] However, when an employer tests an applicant for drugs prior to making a conditional offer of employment, the employer is not permitted to conduct any other tests on the applicant's sample. [30]

The holding in *Loder*, though, appears to have been narrowed by a more recent decision from the Ninth Circuit. In *Lanier v. City of Woodburn*, the Ninth Circuit held that public employers must establish a "special need" to justify pre-hire drug testing. As set forth in *Lanier*, employers must show evidence of "specific and substantial" interest supporting the drug testing of all applicants, not merely a symbolic one (such as wanting to ensure a drug-free workplace).[31] However, if an employer can establish a nexus between the duties of a particular job and the need to ensure the person engaged in those duties is not under the influence of drugs – for example, public safety jobs – it would likely satisfy the *Lanier* standard.[32]

Despite the apparent narrowing of the scope of pre-hire drug testing, employers are not wholly prohibited from inquiring as to an employee's current illegal drug use.[33] An individual who currently uses drugs illegally is not protected under the ADA or FEHA.[34] Accordingly employers may ask about current illegal drug use without violating either of those statutes. However, because *past* drug use is generally considered a disability under both state and federal law, employers are discouraged from asking questions about *past* addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program.[35] Importantly, while past drug *addiction* is considered a disability, past casual drug use is not.[36]

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[27] *Loder*, *supra*, 14 Cal.4th at 883.

[28] *Id. at 900*

[29] *Id. at 883-84.*

[30] *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 708-09 (2005); Cal. Health & Safety Code §120980(f)

[31] *Lanier*, *supra*, 518 F.3d at 1150-51.

[32] *Id.* (citing *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602, 628-29 (operation of railway cars); *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 677-78 (1989) (armed interdiction of drugs); *IBEW, Local 1245 v. United States NRC* (9th Cir. 1992) 966 F.2d 521, 525-26 (work in nuclear power facility); *AFGE Local 1533 v. Cheney* (9th Cir.1991) 944 F.2d 503, 506 (national security service); *IBEW, Local 1245 v. Skinner* (9th Cir.1990) 913 F.2d 1454, 1461-63 (operating natural gas pipelines); *Bluestein v. Skinner* (9th Cir.1990) 908 F.2d 451, 456 (aviation industry); *Int'l Bhd. of Teamsters v. Dep't of Transp.* (9th Cir.1991) 932 F.2d 1292, 1295 (operation of commercial motor vehicles)).

[33] EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (https://www.eeoc.gov/policy/docs/guidance-inquiries.html).

[34] 42 U.S.C. §12114(a)(1994); 29 C.F.R. §1630.3(a)(1998); 2 CCR §11071(d).

[35] 29 C.F.R. §1630.3(b)(1), (2)(1998); EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/1995), available at https://www.eeoc.gov/policy/docs/preemp.html

[36] EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (https://www.eeoc.gov/policy/docs/preemp.html).

For similar reasons, an employer generally may not ask about prescription drug use as such questions may be likely to elicit information about an individual's disability.[37] The federal Equal Employment Opportunity Commission (the "EEOC") has recognized a narrow exception to this general prohibition, permitting employers to ask questions about prescription drug usage after a positive drug test. The rationale for allowing such questions is that they may allow the employer to validate results or offer a possible explanation for the positive result other than illegal drug use.[38]

b) Testing for Alcohol

Testing applicants for alcohol usage is even more restrictive than testing for drug usage. This is because under both state and federal law, testing for alcohol usage is considered a "medical examination," which can only be required following a conditional offer of employment.[39]

2. Testing of Current Employees

Following hire, more weight is placed on the privacy rights of an individual and, consequently, employers are more limited in their ability to drug or alcohol test current employees. Limitations around testing are also driven by the context in which the employee is directed to undergo the test.

a) Post-Accident Testing

Unlike with DOT-covered employees, employers are expected to possess some suspicion of impairment before ordering an employee to undergo drug or alcohol testing following a workplace accident. The exception to this standard is for "safety sensitive" job classifications. In *Skinner v. Railway Executives' Ass'n*, the U.S. Supreme Court held that employees – in this case railway workers – could be tested post-accident without reasonable suspicion because the employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[40]

The restrictions on post-accident testing were emphasized in guidelines issued by the federal Occupational Health and Safety Administration ("OSHA") in 2016. Those regulations were issued as part of a broader effort to encourage the reporting of workplace injuries and to protect against retaliation by employers. In commentary accompanying these new rules, OSHA specifically discussed post-accident drug testing as a possible deterrent to reporting workplace injuries. As part of this commentary, OSHA appeared to effectively bar automatic post-accident drug tests. OSHA stated that post-accident drug testing should only be used in "situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use."[41]

OSHA issued clarifying guidance in October 2018, providing that post-accident drug tests would only violate its anti-retaliation rules if the test was conducted in order to "penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and

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[37] *Ibid.*

[38] *Ibid.*

[39] *Leonel*, *supra*, 400 F.3d at 708-09 (citing 42 U.S.C. § 12112(d); Cal. Gov't Code §12940(d)).

[40] *Skinner*, *supra*, 489 U.S. at 628.

[41] OSHA Final Rule "Improve Tracking of Workplace Injuries and Illnesses" (May 12, 2016).

health."[42] The October 2018 guidance clarified that the following types of drug testing are permissible under OSHA's anti-retaliation rules:

1) Random drug testing;[43]

2) Drug testing unrelated to the reporting of a work-related injury or illness;

3) Drug testing under state worker's compensation law; and

4) Drug testing under other federal law, including federal Department of Transportation regulations.[44]

In addition, OSHA clarified that employers may drug test employees to evaluate the "root cause" of a workplace incident that "harmed or could have harmed employees" so long as all employees who could have contributed to the incident are tested – not just the person who reported the incident or injuries.[45]

b) RANDOM TESTING

Courts have determined that drug and alcohol tests constitute a search and seizure within the meaning of the Fourth Amendment of the U.S. Constitution.[46] Given the significant protections for individual privacy recognized under both the federal and California constitutions, random drug and alcohol testing is effectively prohibited. The only recognized exceptions are for "safety-sensitive" positions.[47] The broadest exception to this general prohibition is for employees who are subject to federal Department of Transportation regulations discussed below.

In light of these restrictions, it is critical that employers ensure that their drug and alcohol testing policies and procedures do not include provisions for random testing of all employees. Importantly, random testing policies are impermissible ***even if negotiated*** as part of a collective bargaining agreement between a public agency and an exclusive bargaining representative. Any random testing policy must be narrowly tailored so as to cover only "safety sensitive" jobs. "Safety sensitive" jobs have been defined to include, among others, railway car operators, law enforcement officers involved in the interdiction of drugs, employees who work in a nuclear power facility, national security employees, natural gas pipeline operators, aviation personnel, and commercial motor vehicle operators.[48] Thus, relatively few job classifications within a city government will qualify as "safety sensitive" permitting random drug testing.

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[42] OSHA Standard Interpretations "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. §1904.35(b)(1)(iv)" (Oct. 11, 2018).

[43] Although the OSHA guidance provides that an actual "random" test is not retaliatory, such testing would still be subject to other restrictions and prohibitions discussed herein.

[44] *Ibid.*

[45] *Ibid.*

[46] *Skinner*, *supra*, 489 U.S. at 616-17.

[47] The U.S Supreme Court determined in its decision in *Nat'l Treasury Employees Union Treasury Employees v. Von Raab*, *supra*, 489 U.S. 656, 672, that U.S. Customs officers who were "directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty" may be subject to suspicion-less drug testing. See also *Skinner*, 489 U.S. at 624.

[48] *Lanier*, *supra*, 518 F.3d at 1150-51 (citing *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602, 628-29); *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 677-78 (1989); *IBEW, Local 1245 v. United States NRC* (9th Cir. 1992) 966 F.2d 521, 525-26; *AFGE Local 1533 v. Cheney* (9th Cir.1991) 944 F.2d 503, 506; *IBEW,*

c) Reasonable Suspicion Testing

Current employees typically *cannot* be tested for drugs or alcohol absent reasonable, individualized suspicion that they are under the influence.[49] In order to survive a constitutional challenge, drug and alcohol tests must be reasonable. The reasonableness of a test is judged by balancing the legitimate governmental interest in the search against the employee's privacy interest.

In this context, if there is individualized suspicion that the employee is under the influence, the employer will likely satisfy the "reasonableness" standard. Reasonable suspicion is a belief based on objective evidence sufficient to lead a reasonably prudent person to suspect that an employee is under the influence of drugs and/or alcohol. As a best practice all supervisors – even those who do not supervise DOT-covered employees – should be receive training on reasonable suspicion testing and what to look for when an employee appears to be impaired at work.

It is critical that the observing supervisor appropriately document their observations prior to sending the employee for a drug test. This documentation may include detailed reports from other employees as objective evidence tending to support that the employee is under the influence at work. The supervisor may also choose to meet with the employee to inform them of the observations about their behavior and provide an opportunity for the employee to explain. Depending on the employee's response, the employer may elect to take one of a number of different options:

- If concrete, tangible evidence exists that the employee is under the influence of prohibited drugs at work (either based on the documented observations or the employee's own admission), the employer may require the employee to submit to a drug test. Should the employer send an individual for a drug test, it is important that the employee not be allowed to drive themselves to the drug testing site;
- If the evidence is insufficient to support an objective determination that the employee is under the influence of prohibited drugs (and the employee denies such conduct), the employer can permit the employee to return to work or allow the employee to take sick leave for the rest of the day, if they so elect;
- If the employee indicates that they have taken medical marijuana or alcohol the evening before but are no longer under the influence (e.g., perhaps a strong odor exists), the employer should tread carefully and must analyze whether there is reasonable, individualized suspicion that the employee is still under the influence of such substances before sending the employee for a drug test;[50]
- If the employee indicates that they are taking prescription medications, which are causing the perception that the employee is under the influence of prohibited drugs, the employer should not necessarily require the employee to divulge the medication (or underlying medical condition) at that time, but may need to initiate the interactive process under the ADA and FEHA to determine whether the employee needs reasonable accommodation.

Local 1245 v. Skinner (9th Cir.1990) 913 F.2d 1454, 1461-63; *Bluestein v. Skinner* (9th Cir.1990) 908 F.2d 451, 456; *Int'l Bhd. of Teamsters v. Dep't of Transp.* (9th Cir.1991) 932 F.2d 1292, 1295).

[49] *Loder*, *supra*, 14 Cal.4th at 877-81.

[50] Where marijuana is concerned, employers need to be particularly careful insofar as marijuana remains illegal under federal law and its use can be grounds for discipline, but as the law continues to develop, employees who use marijuana outside of work and are no longer under the influence at work, may argue that employer restrictions of such rights unduly interfere with their Constitutional privacy rights. To date, the authors are unaware of any published case authority to that effect, however.

A situation in which an employee discloses that prescription drugs may be impacting their performance is particularly challenging to navigate. Should the employer insist on a drug test and should the test come back as positive for illegal substances, the employer is permitted to make limited inquiries of the employee as to whether the prescription medication could be responsible for the positive result. The employer may also request, as part of the interactive process, that the employee provide documentation from their physician as to any necessary job restrictions or side effects from medications that may require accommodation.

It is the employee's responsibility to consult with their prescribing physician to ensure that the medication, when taken in proper dosage, will not present an immediate threat of harm to themselves or others. In a situation where the employee appears to be impaired, the employer may suggest to the employee that they take sick leave if the use of prescription medication is creating an immediate threat of harm. This will allow additional time for the employee to follow up with their physician and confirm whether the medications need to be re-evaluated or the dosage modified.

d) RETURN TO DUTY TESTING

Unlike with DOT-covered employees, there is no detailed statutory scheme setting forth "return to duty" requirements for employees who have tested positive for drug or alcohol use. That does not mean that employers should simply let employees come back to work without some assurances that they are no longer under the influence. Options for responses to positive drug tests include:

1. REHABILITATION

While an employer need not permit any drug or alcohol use on the job or at the worksite (aside from lawfully-prescribed medications), public employers generally must allow employees to enter rehabilitation programs and cannot discriminate against recovering drug and alcohol users who are covered by the disability provisions of the ADA and FEHA.[51] Accordingly, public employers are advised to make explicit in their drug and alcohol policies that leave is available for employees to attend rehabilitation programs, with the understanding that use of alcohol or illegal drugs on the job will constitute grounds for discipline, up to and including termination.

2. EMPLOYEE ASSISTANCE PROGRAMS (EAP)

Employee Assistance Programs ("EAPs") are intended to help employees deal with personal problems that might adversely impact their job performance, health and well-being. EAPs often provide employees with access to counseling and education services at no cost. EAPs (and "Wellness" programs) should be voluntary and employers should not require participation or penalize employees who do not participate.

[51] See 42 U.S.C. §12102; Cal. Gov. Code §§12926, 12926.1(a); Cal. Code Regs., Tit. 2, §7294(d)(2)(B) (past addiction to drugs protected under FEHA as a disability); *Brown v. Lucky Stores, Inc.* (2001 9th Cir.) 246 F.3d 1182, 1187 (recognizing alcoholism as a disability under the ADA analysis and providing that ADA analysis also applies to FEHA); *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 (alcoholism can be covered disability under FEHA) (unpublished).

3. Last Chance Agreement

Last chance agreements ("LCAs") are agreements between an employer and an employee (potentially also involving the employee's union) the purpose of which is to provide an employee who is otherwise facing termination or other serious discipline with a final opportunity to remain employed in exchange for the employee's agreement to enter into a rehabilitation program, refrain from further use of drugs or alcohol, and/or submit to periodic testing. While LCAs may also be used outside of the drug and alcohol context when an employee has performance issues or has engaged in other forms of misconduct, they are commonly employed in situations where an employee has tested positive for being under the influence of prohibited substances at work.

Typically, an LCA will have the following elements:

- Basis for the agreement, including a summary of the employee's conduct and employer's policies that were violated;
- Expectations regarding what requirements the employee must satisfy to avoid future discipline and/or termination;
- Progress/time frames for various stages of progress;
- Consequences for violation of the agreement
    - Typically, an LCA will provide that a violation will result in immediate termination (without any additional due process, which the employee will have agreed to waive, except for the ability to contest whether the violation occurred).
- An expiration date.

LCAs are a useful tool for both employers and employees alike insofar as they provide a strong incentive for the employee to avoid any future violations of drug or alcohol policies, while allowing the employee to retain their employment. LCAs may also alleviate the need for lengthy (and costly) administrative proceedings and/or litigation and allow for both parties to agree upon the consequences for additional violations during the term of LCA. Nevertheless, if a violation is particularly severe or dangerous (e.g., driving a vehicle or operating machinery while under the influence of drugs or alcohol), it may be necessary to resort to serious discipline immediately.

4. Termination/Discipline

Employers may discipline, and in some cases, terminate employees who test positive for drug and alcohol usage. However, as part of the discipline/termination process, the employer must generally establish that there is "just cause" for termination or other serious discipline. This is particularly important if the employee is covered by a collective bargaining agreement that includes a discipline process. Factors such as the level of the offense, the employee's past disciplinary record, the nature of the employee's position or job functions, the employer's policies or collective bargaining agreement with an employee organization, treatment of similarly-situated employees and other considerations, may play a role in determining the

appropriate level of discipline for violations of workplace drug and alcohol policies.[52] Additionally, most public employees in California are entitled to "*Skelly*" rights, including reasonable notice of the grounds for discipline and pre-disciplinary due process rights to respond and meet with their employer to contest the factual basis for, or severity of, the discipline.[53] This includes presenting mitigating factors against severe discipline for a first offense or an offense of lesser severity. Accordingly, while an employer may not run afoul of statutory constraints such as the ADA or FEHA, in the context of public employment, the discipline imposed can still be overturned or reduced by arbitrator, civil service board or other adjudicatory body where it is deemed excessive or disproportionate.

Given the principles of "just cause" that apply to most employees working in the public sector, employers need to carefully balance "zero-tolerance" policies and compliance with state and federal drug-free workplace laws, on the one hand, with the appropriate level of discipline on the other, taking into account specific factual circumstances.

While legislative efforts to make medical marijuana users a protected class in California thus far have stalled, challenges to efforts to discipline employees for both medical and recreational marijuana use are likely to persist over the next several years, both in the California legislature and in the courts. This is true particularly in instances where an employee may test positive for marijuana use, but the employer lacks evidence that the employee was under the influence or impaired in any meaningful way at work. Again, where an employer must show "just cause" for discipline, neutrals may overturn or reduce discipline where the employer cannot demonstrate that the employee was impaired during the workday.[54]

B. DOT-Covered Employees

The federal government has promulgated a detailed regulatory scheme aimed at ensuring that individuals who operate commercial motor vehicles are not under the influence of drugs or alcohol while operating those vehicles.[55] DOT regulations further require employers to provide educational materials to their employees that explain the employer's policies related to these regulations.[56] The DOT regulations prohibit covered individuals from engaging in safety-sensitive functions[57] while under the influence of drugs or alcohol.

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[52] Elkouri & Elkouri, *How Arbitration Works (*Bloomberg BNA, Seventh Ed. 2012), Ch. 15.2.A.ii., Ch. 13.17.F.F.iii; Brand & Biren, *Discipline and Discharge in Arbitration* (Bloomberg BNA, Third Ed. 2015), Ch. 6.I, Ch. 6.II.A-F.

[53] A *Skelly* hearing derives its name from *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which a physician and permanent civil service employee was terminated from employment with the State of California. The California Supreme Court held that Dr. Skelly was deprived of his due process rights by not being provided "the materials upon which the action is based" prior to his employment being terminated. Subsequently, Skelly rights have been broadened to apply to lesser disciplinary actions, such as demotions and suspensions.

[54] Barsook, Platten & Vendrillo, *California Public Sector Employment Law* (Matthew Bender 2018), § 7.36 [1]-[3] (authored by Margot Rosenberg, et al.) includes a very comprehensive discussion of policy and disciplinary considerations relating to drug and alcohol use; see also *Lane Cty*., 136 Lab. Arb. 585 (Jacobs, 2016) (arbitrator found county lacked just cause to terminate employee for use of medical marijuana despite no requirement to accommodate); McCarthy and A. Terpsma, *21st Century Arbitration Decisions on Discharges for Possession or Use of Marijuana*, Warner, Norcross & Judd, presented at ABA Conference on Alternative Dispute Resolution, February 2015.

[55] 49 C.F.R. §382.103.

[56] 49 C.F.R. §382.601

[57] Safety-sensitive functions are defined in 49 C.F.R. §382.107 as:

> [A]ll time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work.

Although the DOT regulations are extensive, they can largely be summarized as prohibiting employees who are under the influence of alcohol[58] or drugs[59] from reporting to duty, remaining on duty, or performing safety-sensitive functions, and require employers with knowledge that employees are under the influence of alcohol or drugs (or who have tested positive for such use) to prohibit those employees from engaging in safety-sensitive functions.[60] Importantly, these rules do include a narrow exception for the use of prescription drugs.[61]

The terms "controlled substances" and "drugs"[62] for purposes of the DOT regulations are defined to include marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.[63] For purposes of DOT rules, alcohol screening tests are considered positive if the alcohol concentration level is 0.04 or greater.[64] The threshold for a positive drug test varies depending on the controlled substance. These thresholds are set forth in **Appendix A**.

DOT rules require multiple forms of testing for alcohol and drugs including pre-hire testing, random testing, reasonable suspicion testing, and return to duty or other follow-up testing after a positive test.[65]

1. Pre-Hire Testing

All employees whose work requires them to engage in safety-sensitive functions must be tested for drugs – but not alcohol – prior to first performing those functions.[66] Not only must employees submit to pre-employment drug tests, employees must also consent to having their previous employers turn over their drug and alcohol testing records to their current employer. This includes the results of positive alcohol and

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(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of §393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

[58] 49 C.F.R. §§382.201, 382.205.

[59] 49 C.F.R. §§382.213(a), 382.215.

[60] 49 C.F.R. §§382.201-207, 213-217.

[61] 49 C.F.R. §382.213(b) provides that employees who are under the influence of a drug not listed as a "Schedule I" substance in 21 C.F.R. §1308.11, may not report to or remain on duty, *unless* that drug is used pursuant to a prescription from a licensed medical professional who (i) is familiar with the employee's medical history and (ii) has advised them that the substance will not adversely affected their ability to operate a commercial motor vehicle.

[62] These terms appear to be used interchangeably with the term "drugs" being used in 49 C.F.R. §40 et seq. and the term "controlled substances" being used in 49 C.F.R. §§382 et seq.

[63] 49 C.F.R. §§40.3, 382.107.

[64] 49 C.F.R. §382.201. However, 49 C.F.R. §382.505(a) provides that employees with alcohol concentration above 0.02 but less than 0.04 shall not be permitted to perform or continue performing safety-sensitive functions for at least twenty-four (24) hours following administration of the test.

[65] 49 C.F.R. §§382.301, 382.305, 382.307, 382.309, 382.311.

[66] 49 C.F.R. §382.301.

drug tests, any refusals to be tested, other DOT testing violations and the results of any return to duty tests, if applicable.[67] Though an employee can withhold this consent, they will not be permitted to engage in safety-sensitive functions.[68] Upon receipt of an employee's past drug and alcohol testing results, if an employer receives information that an employee has previously tested positive under DOT regulations, the employer cannot allow that employee to continue engaging in safety-sensitive duties unless and until they receive evidence that the employee has also complied with DOT return to duty rules.[69]

2. *Testing of Current Employees*

Following their hire, DOT-covered employees remain subject to periodic drug and alcohol testing. As discussed below, DOT-covered employees must be: (i) tested following certain accidents while operating commercial motor vehicles, (ii) subject to random testing, and (iii) as with non-DOT covered employees, tested when a trained manager has reasonable suspicion that the employee is under the influence of alcohol or drugs.

a) Post-Accident Testing

Post-accident testing is not required after *all* workplace accidents or *all* accidents involving commercial motor vehicles. Rather, post-accident testing is only required in the following circumstances:

1) Where the driver receives a citation for a moving violation and the accident resulted in either:

    a. A bodily injury with immediate medical treatment away from the scene; or

    b. Disabling damage to any motor vehicle requiring a tow away from the scene; or

2) The accident results in a fatality, regardless of whether the driver receives a citation.[70]

When a post-accident test is required, the DOT regulations set forth strict timelines for the completion of those tests. Specifically, alcohol tests should be completed within two hours of the accident and cannot be completed if not conducted within eight hours of an accident. [71] Employees required to take a post-accident test are prohibited from using alcohol for: (i) eight hours following the accident or (ii) until they undergo a post-accident alcohol test, whichever occurs first.[72] The timeframe for completing drug tests is longer – 32 (thirty-two) hours[73] – owing to the time it takes a body to metabolize those substances. However, failure to complete either a drug or alcohol test within the applicable timeframe results in the same consequence - the employer is prohibited from testing the employee and must prepare and maintain on file a record stating the reasons why the test was not promptly administered.[74]

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[67] 49 C.F.R. §40.25(b).

[68] 49 C.F.R. §40.25(a).

[69] 49 C.F.R. §40.25(e).

[70] 49 C.F.R. §382.303(a)-(b).

[71] 49 C.F.R. §382.303(d)(1).

[72] 49 C.F.R. §382.209

[73] 49 C.F.R. §382.303(d)(2).

[74] *Ibid.*

b) RANDOM TESTING

As discussed *supra*, random drug and alcohol testing of employees is generally considered an impermissible and unconstitutional invasion of individual's privacy rights. However, given the nature of their work, in the case of employees who engage in safety-sensitive functions, the government's interest in ensuring these individuals are not under the influence of drugs or alcohol outweighs the individual's privacy interests. Accordingly, every DOT-covered employee must be subject to random drug and alcohol testing.[75] Section 382.305 of Title 49 of the Code of Federal Regulations sets forth in detail the standards for annual random alcohol and drug testing, including the percentage of employees to be tested and mechanisms to adjust these percentages.[76] In order to ensure randomness of the tests, the tests must be unannounced and spread throughout the calendar year.[77] When employees are selected for a random test, they are generally expected to proceed to the testing site immediately.[78] Employees will *only* be tested for alcohol use while they are performing safety-sensitive functions, just before they are to do so or directly after completing a safety-sensitive function.[79]

c) REASONABLE SUSPICION TESTING

Similar to employees not covered by DOT regulations, DOT-covered employees will be sent for drug and/or alcohol testing when a trained manager has reasonable suspicion that an employee is under the influence. 49 C.F.R. §382.307 requires employers who have reasonable suspicion that an employee has violated the prohibitions on alcohol or drug use set forth in 49 C.F.R. §§382.201-217 to send that employee for testing. Again, as a practical matter, it is important that an employee who is suspected of being under the influence not be allowed to drive themselves to the drug testing site. Options include having the supervisor drive the employee to the testing site or providing taxi or ride-share service to and from the testing site. Reasonable suspicion under the DOT regulations must be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver."[80] In the case of drug use, the reasonable suspicion may also be based on observation of "indications of the chronic and withdrawal effects of controlled substances."[81] For DOT-covered employees, the observations must be made by a supervisor who has completed at least sixty minutes of training on alcohol misuse and at least sixty minutes of training on controlled substances.[82]

In practice, supervisors should document their observations in writing and in specific detail, including observations of:

- Odors, such as the smell of alcohol or marijuana
- Unsteady movements, including signs of dizziness;
- Abnormal speech patterns, including slurred or slow speech or an inability to complete thoughts;

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[75] 49 C.F.R. §382.305(a).

[76] 49 C.F.R. §382.305(b)-(j).

[77] 49 C.F.R. §382.305(k).

[78] 49 C.F.R. §382.305(l). The exception to this general rule applies when an employee is in the midst of completing a safety-sensitive function other than driving a commercial motor vehicle. In that case, the employee may finish that function and proceed to the testing site as soon as possible thereafter.

[79] 49 C.F.R. §382.305(m).

[80] 49 C.F.R. §382.207(a)-(b).

[81] 49 C.F.R. §382.307(b).

[82] 49 C.F.R. §§ 382.307(c), 382.603.

- Dialated eyes;
- Flushed face;
- Unusually argumentative or irritable behavior; and/or
- Falling asleep on the job.

Importantly, however, a supervisor should not attempt to diagnose an employee or include subjective beliefs about what is going on with the employee. Rather, their documentation should only include their objective observations.

d) <u>RETURN TO DUTY TESTING</u>

Should an employee test positive for drugs or alcohol following an accident, as part of a random test, or upon reasonable suspicion that they were under the influence, that employee must be cleared by a substance abuse professional (the "SAP") prior to returning to performing safety-sensitive functions. The "return to duty" process is detailed in 49 C.F.R. 40, subpart O. In summary, the SAP has a significant authority to determine a course of education or treatment for the impacted employee and unless and until the SAP determines that the individual has successfully completed that course of education or treatment, they may not be returned to perform safety-sensitive functions.[83] Once the SAP has determined that the employee successfully completed the recommended education and/or treatment, the employee must undergo a drug or alcohol test. Only if the results of that test are negative may the employee return to performing safety-sensitive functions.[84] DOT regulations do not require an employer to return an employee to safety-sensitive duties simply because they have passed a return-to-duty test.[85] However, an employer's collective bargaining agreement or policies may require such a result.[86]

IV. <u>BEST PRACTICES FOR ADDRESSING PRESCRIPTION DRUG USE IN THE WORKPLACE</u>

One common pitfall that many employers fall into in the drafting of workplace drug and alcohol policies is not establishing appropriate parameters around the treatment of lawfully prescribed medication and illegal drugs – both of which may have an intoxicating effect on employees but use of only one of which (prescription drugs) is protected under the ADA and FEHA. In light of the requirements imposed by the ADA and FEHA aimed at protecting employees from discrimination based on medical conditions and/or the use of medication, below are a handful of best practices that will help employers avoid running afoul of these statutes.

A. <u>EMPLOYERS' DRUG AND ALCOHOL POLICIES SHOULD CARVE OUT EXCEPTIONS FOR THE USE OF LAWFULLY-PRESCRIBED MEDICATIONS</u>

As discussed above, an employee's use of lawfully-prescribed medication is an issue only where there is concrete, tangible and objective evidence that use of the medication either prevents the employee from performing the essential job functions of their position or creates a direct threat to the health or safety of

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[83] 49 C.F.R. §§40.293, 40.295, 40.301, 40.303, 40.309.

[84] 49 C.F.R. §40.305(a).

[85] 49 C.F.R. §40.305(b).

[86] *Ibid.*

the employee or others,[87] and even then, the employer must engage in an interactive process to determine if a reasonable accommodation can eliminate that threat.[88]

According to federal regulations, a "direct threat" is defined as follows:

> ***Direct Threat*** means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" must be "based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) The imminence of the potential harm.[89]

Notably, the mere "*potential*" for poor performance or a threat to safety is not a sufficient basis to prohibit the use of legally-prescribed drugs or to impose reporting requirements or other restrictions. Workplace drug and alcohol policies should clearly state that prescription medications are not prohibited when taken in standard dosage and/or according to a lawful prescription. Policy language should also provide that it is the employee's responsibility to consult with the prescribing medical provider to ascertain whether the medication may interfere with the ability to safely and effectively perform job functions.

B. *EMPLOYERS SHOULD GRANT LEAVE FOR EMPLOYEES TO ATTEND REHABILITATION PROGRAMS*

While an employer need not permit any drug and alcohol use on the job or at the worksite (aside from lawfully-prescribed medications), public employers generally must allow employees to enter rehabilitation programs and cannot discriminate against recovering drug and alcohol users, who are protected by the ADA and FEHA. The ADA recognizes individuals who are not currently using illegal drugs, but are participating, or have participated, in a supervised rehabilitation program as having a protected disability. While FEHA does not specifically set forth the same protections, the language in FEHA recognizing conditions that "limit" major life activities essentially encompasses alcoholism as a chronic disease, and therefore, protects recovering alcoholics (assuming current use is not interfering with work) even if not necessarily attending rehabilitation.[90] Accordingly, public employers should make clear in their drug and alcohol policies that leave is available for employees to attend rehabilitation programs, with the understanding that use of alcohol or illegal drugs on the job will still constitute grounds for discipline.

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[87] EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (http://www.eeoc.gov/policy/docs/guidance-inquiries.html) (see No. 5); 22 C.C.R. §7294.2(d)(2).

[88] 29 C.F.R. §1630.2(r)(1)-(4); *Hibbing Taconite Co.*, *supra*, 720 F. Supp. 2d at 1082-1083.

[89] 29 C.F.R. §1630.2(r)(1)-(4).

[90] See *Brown v. Lucky Stores, Inc.* (2001 9th Cir.) 246 F.3d 1182, 1187 (recognizing alcoholism as a disability under the ADA and providing that ADA analysis also applies to FEHA); *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 (alcoholism can be a covered disability under FEHA) (unpublished).

It is well-settled that the current use of illegal drugs is not considered a disability under the ADA or FEHA.[91] Accordingly, a public employer is within its rights to take into consideration an employee's current illegal drug use in disciplinary decisions.[92] Nevertheless, under the ADA, an individual may have a protected disability where they have successfully completed a supervised drug rehabilitation after engaging in illegal drug use, have otherwise been rehabilitated successfully and are no longer engaging in illegal drug use or are currently participating in a supervised rehabilitation program and no longer engaging in illegal drug use.[93]

Individuals who are currently in a program or have undergone rehabilitation would also be protected under FEHA, even though such protections are not specifically articulated as they are under the ADA.[94] FEHA intentionally applies a broader definition of "disability" than the ADA, meaning that "alcoholism" may be considered a disability where it merely "limits" any major life activities (as contrasted to disabilities under the ADA, which must "substantially limit" major life activities).[95]

Again, because the definition of "disability" is construed broadly under both FEHA and the ADA, there should not be any punitive language in drug and alcohol policies that could be construed to discriminate against persons currently or previously enrolled in rehabilitation programs, who are not presently engaging in drug or alcohol use.

C. EMPLOYERS SHOULD MAKE CLEAR THAT MEDICAL MARIJUANA USE AT WORK VIOLATES THEIR DRUG-FREE WORKPLACE POLICIES

As mentioned above, medical marijuana is a prominent exception to the general prohibition against disciplining an employee for using lawfully-prescribed medications. Although medical marijuana use is legal in California, current state law does not require employers to accommodate its use.[96] Likewise, based on the express language of the ADA, an employer need not permit current illegal drug use, so employers who discipline an employee for medical marijuana use are also not subject to liability under federal law.[97] For sake of clarity and ensuring a shared understanding between employer and employee, any workplace drug and alcohol policy should clearly state that marijuana is considered a prohibited substance, regardless of whether it is being used lawfully pursuant to the Compassionate Use Act of 1996.

D. EMPLOYERS SHOULD MAKE READILY AVAILABLE AN EMPLOYEE ASSISTANCE PROGRAM

Many public employers maintain Employee Assistance Programs ("EAPs"), which are intended to help employees deal with personal problems that might adversely impact their job performance, health and well-being. EAPs often provide employees with access to counseling and education services at no cost. Where applicable, an EAP policy should be cross-referenced within the employer's drug and alcohol policy.

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[91] 42 U.S.C. §12114(a) ("… a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."); Cal Gov. Code §12696 subds. (j)(5), (m)(6) (excluding from the definitions of mental and physical disabilities conditions resulting from the "current unlawful use of controlled substances or other drugs").

[92] *Ibid.*; see also *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920.

[93] 42 U.S.C. §12114 (b)(1-3); see also Cal. Gov. Code §12940.

[94] Cal. Gov. Code §§12926, 12926.1(a); 42 U.S.C. §12102.

[95] *Ibid.*

[96] See *RagingWire, supra* note 9 and *Kohl's Dep't. Stores, supra* note 11.

[97] 42 U.S.C. §12114(a); *Brown v. Lucky Stores, Inc.*, *supra*, 246 F.3d 1182, 1187.

It is strongly recommended that public employers include language in their drug and alcohol policies actively encouraging employees with a drug or alcohol problem to seek assistance.

V. CONCLUSION

It is critical for public employers to institute workplace drug and alcohol testing policies in order to ensure compliance with applicable state and federal laws requiring employers to certify that their workplaces are "drug-free." It is equally critical that these drug and alcohol testing policies comply with applicable anti-discrimination law and constitutional privacy protections. To ensure that a workplace drug and alcohol policy does not run afoul of these law, employers should ensure that they (i) do not include random drug testing except for employees covered by federal DOT regulations, (ii) do not lump prescription drugs in with illegal drugs (with the exception of medical marijuana), and (iii) do not result in discipline or other adverse actions for employees who participate in rehabilitation programs.

It is also important to remember that, despite recent changes to California law legalizing recreational marijuana, employers are not obligated to accommodate its use at work (for either recreational or medical purposes) and have the ability to reject applicants and discipline employees who test positive for marijuana use. For so long as marijuana remains illegal under federal law and no conflicting laws are adopted by the California legislature, it is likely advisable to maintain a drug-free workplace policy that treats marijuana like other illicit substances.

APPENDIX A

Type of Drug or Metabolite[98]	Initial Test*	Confirmation Test*
(1) Marijuana Metabolites	50	
(i) Δ-9-tetrahydrocannabinol-9-caroxylic acid (THCA)		15
(2) Cocaine metabolites	150	
(i) Benzoylecgonine		100
(3) Phencyclidine (PCP)	25	25
(4) Amphetamine/Methamphetamine	500	
(i) Amphetamine		250
(ii) Methamphetamine		250
(5) Methylenedioxymethamphetamine (MDMA)/ Methylenedioxyamphetamine (MDA)	500	
(i) MDMA		250
(ii) MDA		250
(6) Opioid Metabolites		
(i) Codeine/Morphine	2000	
a. Codeine		2000
b. Morphine		2000
(ii) 6-Acetylmorphine	10	10
(iii) Hydrocodone/Hydromorphone	300	
a. Hydrocodone		100
b. Hydromorphone		100
(iv) Oxycodone/Oxymorphone	100	
a. Oxycodone		100
b. Oxymorphone		100

*Measurements below are reflected as nanograms per milliliter.

[98] 49 C.F.R. §40.87.