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**CALPELRA**  
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# Newest Developments in Workplace Drug and Alcohol Laws

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1



## Agenda

- Impact of Changing State (and Unchanging Federal) Marijuana Laws on Workplace Drug Policies
- Best Practices Related to Drug and Alcohol Testing
- Common Pitfalls for Prescription Drugs in the Workplace and How to Avoid Them

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## Challenge: Consistency with Numerous and Conflicting Laws



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## Two Key Interests to Reflect in Policies



1. Ensuring a drug-free workplace, consistent with state and federal law
2. Protecting the rights of employees:
  - ensuring due process
  - preventing discrimination
  - meeting legitimate medical needs

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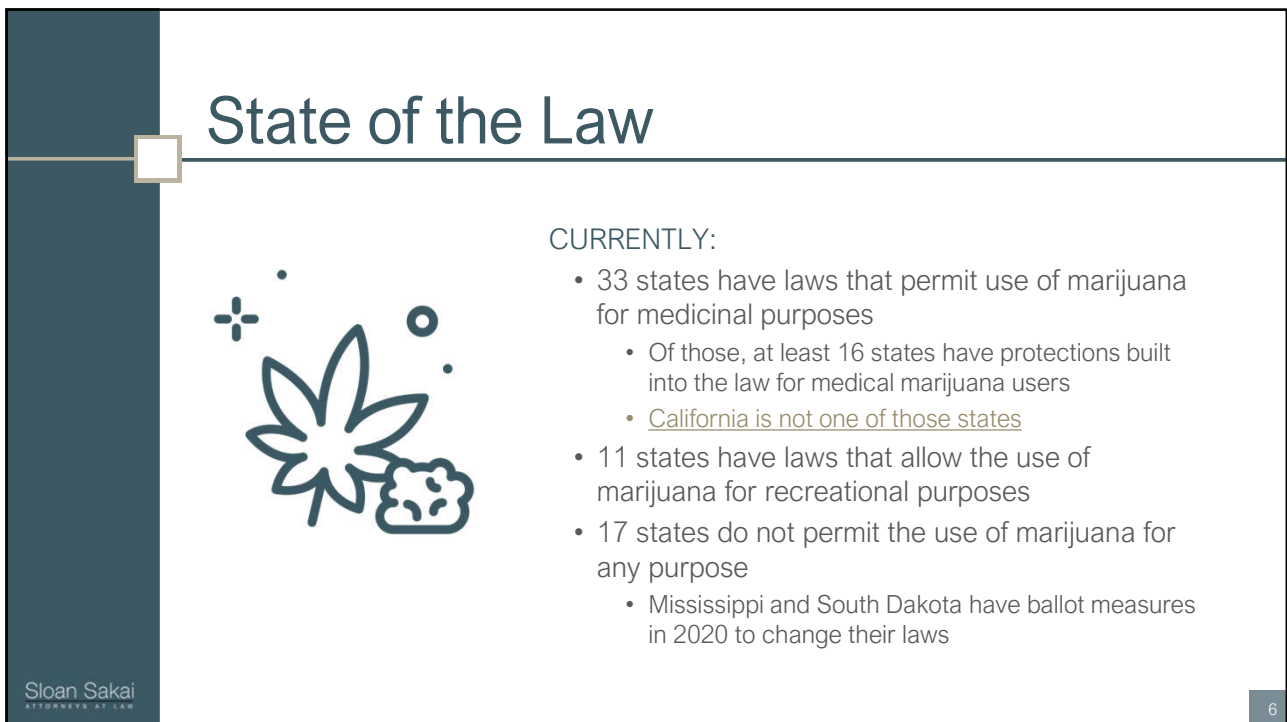


Impact of Changing State Marijuana Laws on Workplace Drug Policies


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5



## State of the Law



CURRENTLY:

- 33 states have laws that permit use of marijuana for medicinal purposes
  - Of those, at least 16 states have protections built into the law for medical marijuana users
  - California is not one of those states
- 11 states have laws that allow the use of marijuana for recreational purposes
- 17 states do not permit the use of marijuana for any purpose
  - Mississippi and South Dakota have ballot measures in 2020 to change their laws

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6

## State of the Law



### AT THE FEDERAL LEVEL:

- Marijuana is still a Schedule I controlled substance
  - Particularly important point for public agencies who receive federal funding
- Though illegal under Federal law, enforcement has not always been prioritized
  - *Cole Memorandum: Issued in 2013 by then- Deputy Attorney General James Cole directing federal prosecutors not to enforce federal marijuana laws in states that "legalized marijuana in some form and ... implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana," except where a lack of federal enforcement would undermine federal priorities (such as preventing violence in marijuana cultivation and distribution, preventing cannabis impaired driving, and preventing marijuana revenues from going to gangs and cartels)"*
  - Rescinded by Attorney General Jeff Sessions in 2018
  - Federal Department of Transportation never loosened its rules concerning marijuana usage

7

## Critical Provisions for California Employers



### Compassionate Use Act of 1996

- Silent as to employment law impacts of medical marijuana usage
- 2003 legislation – Medical Marijuana Program Act clarified that employers need not accommodate usage at the worksite or during work hours

### Adult Use of Marijuana Act (2016) (Prop. 64)

- Explicitly permits employers to maintain drug-free workplace policies

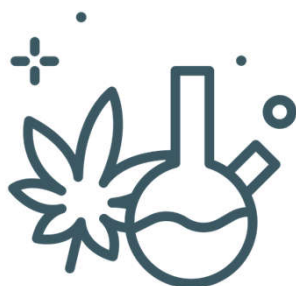
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## Where does this leave employers?



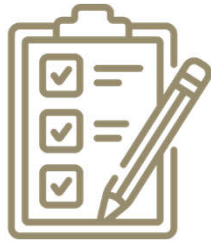
- No need to hire applicants who test positive for marijuana metabolites – even if applicant holds a valid medical marijuana card
  - Key case: *Ross v. RagingWire* (2008) 42 Cal.4th 920
- No need to accommodate usage of marijuana at work – regardless of whether it is for medical or recreational use
- Employers can maintain drug- and alcohol-free workplace policies

## Practical Considerations for Policy Enforcement: Positive Marijuana Tests



- Testing is imprecise
  - See *Shepherd v. Kohl's Dept. Stores* (E.D. Cal. Aug. 2, 2016) 2016 WL 4126705
- Policy should be enforced consistently
- Strict enforcement may:
  - Significantly reduce pool of applicants
  - Lead to disability discrimination claims
  - Appear to conflict with broader City interest in encouraging cannabis sale/distribution within jurisdiction

## Marijuana Policies



### KEY PRACTICE POINTERS

- ✓ Drug-free Workplace Policy should explicitly state that marijuana usage at the worksite and/or being under the influence at work is prohibited
- ✓ Be precise in any discipline documentation
- ✓ Consider impacts of “zero tolerance” policy as applied to positive marijuana tests – and make sure City management structure is on the same page

11

## Best Practices Related to Workplace Drug and Alcohol Testing

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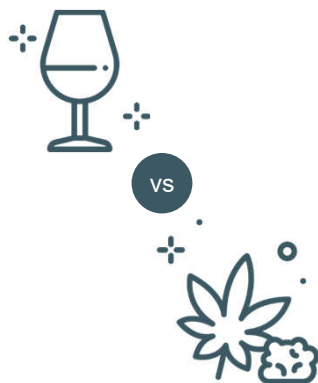
## Two Groups of Employees



1. Those subject to Federal Department of Transportation (DOT) regulations
  - May also include employees in other “safety sensitive” positions
2. Those not subject to DOT regulations

Key difference: Less weight placed on privacy interests of DOT-covered employees = means broader ability to test these employees

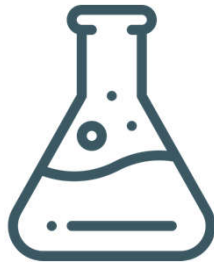
## Timing: What's Being Tested?



### Drugs/Controlled Substances v. Alcohol

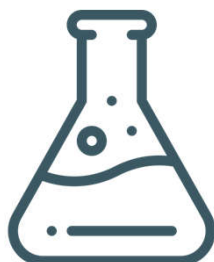
- Test for alcohol is considered a “medical examination”
- For applicants, alcohol testing is only permissible after conditional offer of employment
- Drug test may be completed prior to conditional employment offer

## Timing: Scope of Testing?



- Pre-Hire
- Post-Hire
  - Random
  - Reasonable Suspicion
  - Post-accident
  - Return to Duty

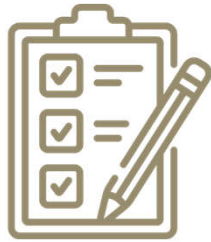
## Pre-Hire Testing



- Broader ability to test applicants than current employees
- BUT
- Right is not absolute
    - See *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 911
    - Compare to *Lanier v. Woodburn* (9th Cir. 2008) 518 F.3d 1147



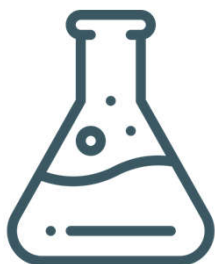
## Pre-Hire Testing



### KEY PRACTICE POINTERS

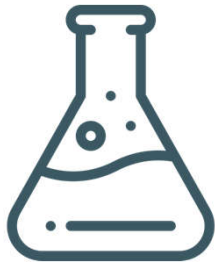
- ✓ Limit pre-hire drug tests only to positions where there is a nexus between the job and employer interest in ensuring people performing those jobs are substance-free

## Random Testing



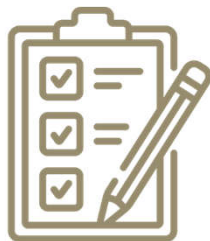
- Generally prohibited except for DOT-covered employees (where it's required) and others in "safety sensitive" positions
- What are "safety sensitive" positions in this context?

## Reasonable Suspicion Testing



- Same standards generally apply regardless of whether employee is covered by DOT regulations
  - Employees may be sent for testing based on “reasonable, individualized suspicion” that they are under the influence of drugs or alcohol at work
  - One key difference: Explicit training requirements for supervisors of DOT-covered employees

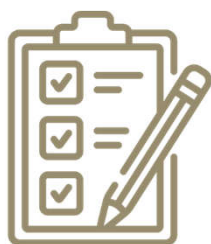
## Reasonable Suspicion Testing



### KEY PRACTICE POINTERS

- ✓ Critical to train supervisors to recognize signs of impairment even if they don't supervise DOT-covered employees
- ✓ Document objective observations

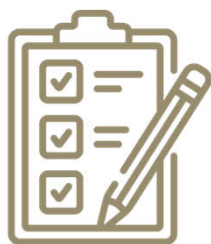
## Reasonable Suspicion Testing



### KEY PRACTICE POINTERS

- ✓ Don't allow employees who are suspected of being under the influence drive themselves to the testing site
- ✓ Generally, don't involve the police department in reasonable suspicion evaluation

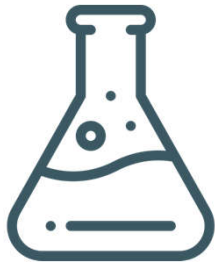
## Post-Accident Testing



### KEY PRACTICE POINTERS

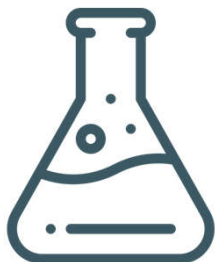
- ✓ Consider whether there is reasonable suspicion for testing even in post-accident context
- ✓ Do not test only employees who report injuries/file workers' compensation claims
- ✓ Exercise caution when testing following accidents that fall outside of DOT regulations in the absence of reasonable suspicion

## Return to Duty Testing Options

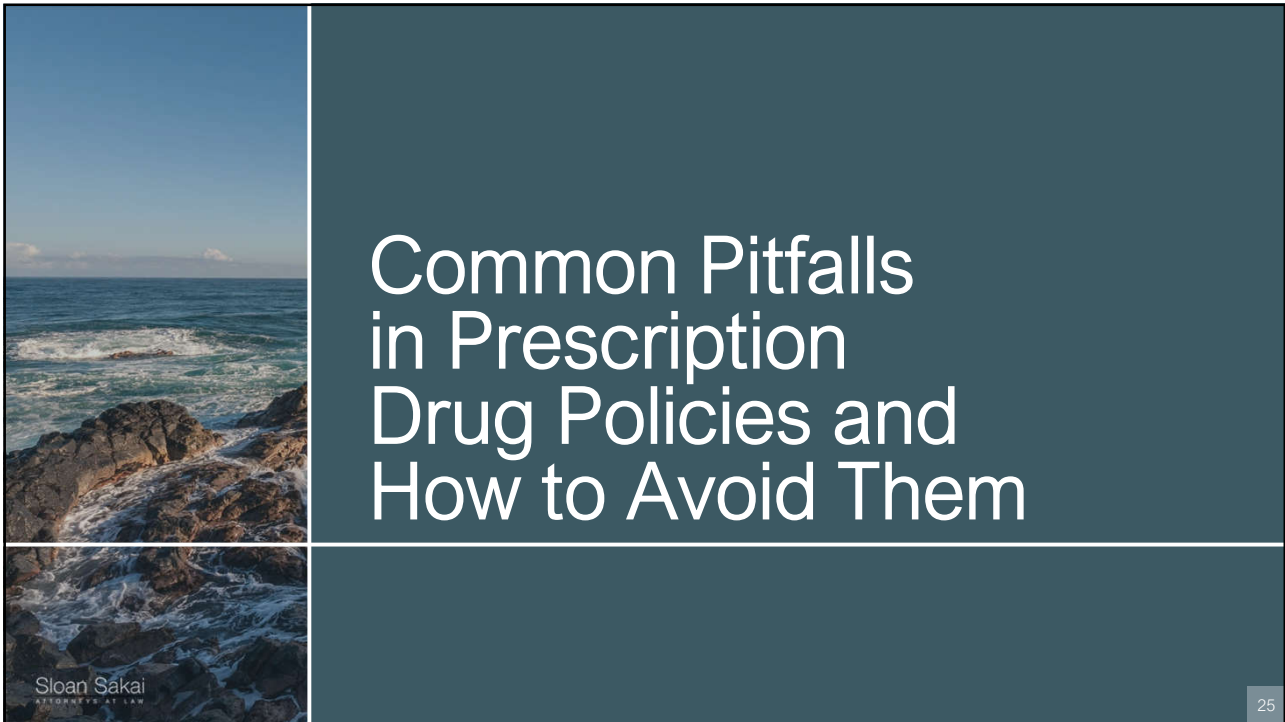


- DOT v. Non-DOT
- Options to respond
  - Rehabilitation
    - Consider ADA/FEHA issues
- Employee Assistance Program
- Last Chance Agreement
- Termination/Discipline

## Key Changes to Testing Regulations



- Implementation of FMCSA Clearinghouse: Requires employers subject to DOT regulations to
  - Report commercial motor vehicle drivers' drug and alcohol program violations
  - Query the Clearinghouse for new hires upon hire and annually for current employees.
  - Revise their drug and alcohol testing policies to list the drug and alcohol violations that will be reported to the Clearinghouse
- Oral Fluid Testing: DHHS updated its guidelines for drug testing federal employees to permit testing of oral fluids (in addition to blood or urinalysis). It is expected that the DOT, which is required to comply with the DHHS guidelines to rollout oral fluid testing guidelines

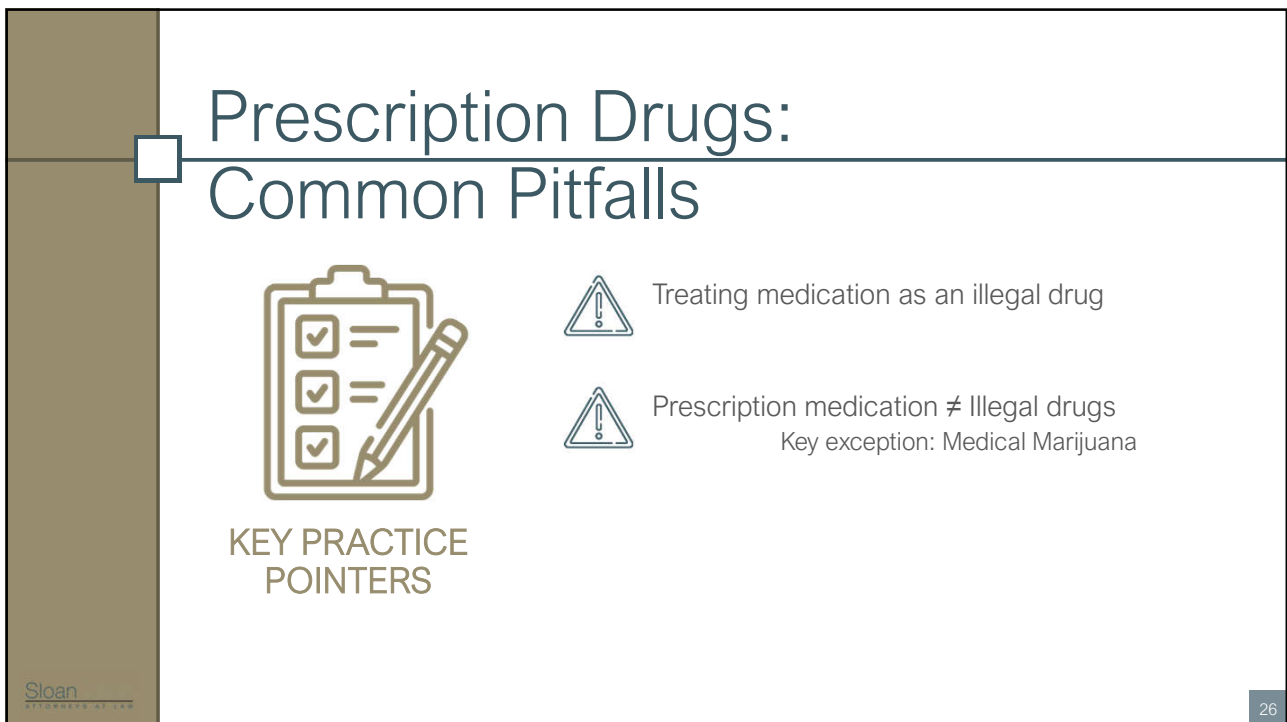


Common Pitfalls  
in Prescription  
Drug Policies and  
How to Avoid Them



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## Prescription Drugs: Common Pitfalls

  Treating medication as an illegal drug

 Prescription medication  $\neq$  Illegal drugs  
Key exception: Medical Marijuana

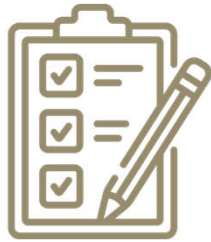
KEY PRACTICE  
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## Prescription Drugs: Common Pitfalls



KEY PRACTICE  
POINTERS



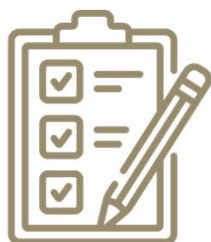
Include exceptions in drug and alcohol policy for legally prescribed medications

BUT



Clarify that use of medical marijuana – regardless of whether an employee has a valid prescription – is a violation of the drug & alcohol policy when used at the worksite (or where employee is under influence at the worksite)

## Prescription Drugs: Common Pitfalls



KEY PRACTICE  
POINTERS

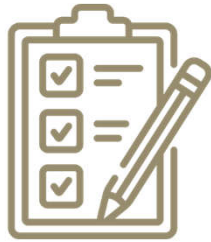


Do not define “drugs” as expressly or implicitly including lawfully-prescribed medications



Do not prohibit employees from taking prescription medications in the workplace

## Prescription Drugs: Common Pitfalls



KEY PRACTICE  
POINTERS

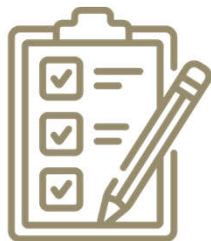


Do not require employees to disclose the existence of a disability or the use of medications



Do not preclude the use of any prescription drugs that may hypothetically increase the “potential” for accidents, absenteeism, or substandard performance

## Prescription Drugs: Common Pitfalls

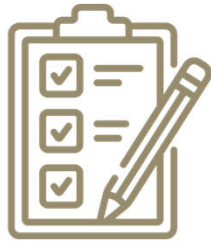


KEY PRACTICE  
POINTERS



Punishing employees who enter rehabilitation programs (either for prescription or illicit drug usage)

## Prescription Drugs: Common Pitfalls



### KEY PRACTICE POINTERS



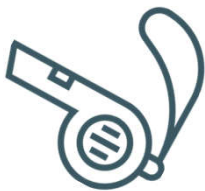
Grant leave for employees to participate in rehabilitation programs



Consider ADA/FEHA implications once they return to work

- Past drug/alcohol addiction = disability protected under ADA/FEHA
- Current illegal drug use/past casual drug use ≠ protected under ADA/FEHA

## EEOC Aggressively Pursues Employers on Prescription Drug Policies



- Recent examples of EEOC enforcement efforts regarding prescription drugs. While these concern private employers, EEOC frequently pursues actions against public agencies.
- *EEOC v. Army Sustainment, LLC*
  - April 2020 – EEOC sues government contractor for requiring employees to discontinue taking certain medications prescribed by physicians as a condition of maintaining employment.
  - According to suit, Army Sustainment prohibited all use of certain prescription medications during both work and non-work hours, including pain control medications. Prohibition was without regard to whether medication interfered with employee's ability to work safely.
  - Some employees allegedly switched to less effective medications, others quit their jobs.
  - <https://www.eeoc.gov/newsroom/army-sustainment-llc-sued-eeoc-disability>



## EEOC Aggressively Pursues Employers on Prescription Drug Policies



- *EEOC v. Steel Painters, LLC*

- *February 2020* – Industrial sandblasting and painting services company agreed to monetary settlement and other relief. According to suit, Steel Painters fired employee based on his record of disability – past opioid drug addiction – and the perception that he continued to have such a disability due to use of medically prescribed methadone.
- When employee's physician declined to sign company-issued verification form due to confidentiality rules, employer allegedly refused to contact rehabilitation clinic directly for more information or allow employer's doctors to evaluate employee. EEOC charged that company's insistence that prescribing physician complete company form was a pretext to hide bias towards people using methadone.
- Court **denied** summary judgment in January 2020. Order relied on existence of several facts in dispute, including employer permitting employee to return to work after drug screening before terminating him (in contradiction of its policy and suggesting it was safe for him to return before being released by a physician), emails possibly suggesting employer had a negative view of persons using methadone, and "feigned ignorance" regarding the purpose of methadone, including testimony suggesting lack of knowledge that methadone may be used to treat opioid addiction. *EEOC v. Steel Painters, LLC*, 433 F.Supp.3d 989 (E.D. Tex. 2020).
- <https://www.eeoc.gov/newsroom/steel-painters-settles-eeoc-disability-discrimination-suit>

## EEOC Aggressively Pursues Employers on Prescription Drug Policies



- *EEOC v. Verity Property Management, Inc.*

- *November 2019* – company agreed to monetary settlement and injunctive relief.
- EEOC investigation determined that well-qualified employee who had been offered higher-level position than she applied for was improperly terminated after drug screening results on first day at work showed she took prescribed medications; Verity officials expressed concern that common side effects associated with the medications would impact her ability to perform her duties and questioned why she had not disclosed her usage. She was terminated on second day without further inquiry, even though she did not experience side effects and was able to perform her job duties.
- Company agreed to implement preventative policies and procedures, as well as consent decree requiring training and ongoing monitoring from EEOC.
- <https://www.eeoc.gov/newsroom/verity-property-management-pay-22500-settle-eeoc-discrimination-lawsuit>

## EEOC Aggressively Pursues Employers on Prescription Drug Policies

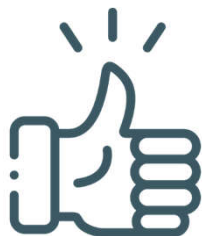


- [EEOC v. Loflin Fabrication, LLC](#)

- [September 2018](#) – EEOC sues metal fabricating company for making improper medical inquiry and terminating employee for failing to provide copy of a prescription for a legally-prescribed medication. Under its “prescription policy,” Loflin allegedly required all employees, regardless of job duties, to provide a copy of all medical prescriptions. Employee took muscle relaxant to treat a spinal impairment at night, not during work hours.
- Before a random drug test, employee notified HR that she took the prescription drug the night before. Company allegedly terminated the employee for not having provided a copy of the prescription. Drug test came back negative.
- [May 2020](#) – federal court denied summary judgment, finding disputed facts regarding whether prescription policy only required disclosure of narcotics prescriptions and whether plaintiff was terminated for failing to disclose prescription. Court evidence existed that prescription policy required all medications to be disclosed.
- The ADA “permits employers to make [medical] inquiries ... when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.” The employer asserting business necessity must have “a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” *EEOC v. Loflin*, 2020 WL 2615479 (M.D.N.C. May 22, 2020), \*6 (citing EEOC Enforcement Guidance) (emphasis added).
- <https://www.eeoc.gov/newsroom/eeoc-sues-loflin-fabrication-improper-medical-inquiry-under-americans-disabilities-act>

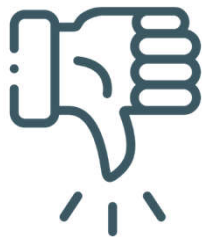
## Closing Thoughts / Tips

## Closing Thoughts/Tips – “DOs”





- ✓ Include policy language carving out exceptions for use of lawfully-prescribed medications
- ✓ Document reasonable suspicion observations
- ✓ Establish a clear policy for when you will require drug or alcohol testing
- ✓ Update policy to reflect Clearinghouse requirements
- ✓ Grant leave for employees to attend rehab
- ✓ Make clear that medical marijuana use (at the worksite) constitutes a policy violation
- ✓ Acknowledge testing exceptions for transportation and other “safety-sensitive” positions
- ✓ Reference your drug and alcohol policy in your EAP

## Closing Thoughts/Tips – “DON'Ts”



- ✓ Lump together (legal) prescription medication use with illicit drug use
- ✓ Overstate rationale for discipline following positive drug or alcohol test
- ✓ Use random drug testing (with limited exceptions)
- ✓ Punish employees who enter rehabilitation programs
- ✓ Discriminate against (or fail to accommodate) employees based on their underlying medical conditions, regardless of their use of medical marijuana





# Questions?


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39

39



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40

40



41