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Workplace Drug and Alcohol Policies: Common Pitfalls for the Public Employer

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INTRODUCTION

Public employers have a strong interest in making sure they operate safe and efficient workplaces. Likewise, public employers also have obligations to their employees that—whether by law or collective bargaining agreements—often go beyond those applicable in the private sector. It is in this context that public employers currently face increasing challenges with respect to the implementation of drug and alcohol policies and the manner in which employers safeguard against the unauthorized use of illegal substances in the workplace. At the forefront of these challenges is public agencies' ability to maintain strong drug and alcohol policies while not running afoul of employees' individual rights or legitimate medical needs.

In California, most public employers are required by state law to certify that they provide a drug free workplace[1] and must also follow the regulations of the Federal Drug Free Workplace Act of 1988.[2] Accordingly, it is critical for public agencies to have a drug-free workplace policy. At the same time, in recent years, the Equal Employment Opportunity Commission (EEOC) has increased its scrutiny of drug-free workplace

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policies, highlighting public employers' need to avoid overbroad policies that may discriminate against employees with disabilities. Recently, the EEOC has found that certain drug-free workplace policies violated protections afforded under the Americans with Disabilities Act (ADA) because they either directly or indirectly infringed upon the users' rights to use prescription medications. In particular, such policies were found to be unlawful because they included prescription medications within a vaguely defined definition of "drugs" while prohibiting, or imposing significant restrictions, upon the use of such medications in the workplace.[3]

This article will outline methods for dealing with the problem of overbroad drug-free workplace policies and explore some of the other significant issues facing California public employers with respect to drug and alcohol policies, all in the context of a primer of suggested "DOs" and "DON'Ts" for public agencies.

DRUG AND ALCOHOL POLICY "DON'TS"

1. **DON'T** Lump Together (Legal) Prescription Medication Use With Illicit Drug Use

Perhaps the single most identifiable problem with many public employers' drug-free workplace policies is the inclusion of language that is overbroad. For instance, many employers' policies directly—or inadvertently—prohibit the use of lawfully-prescribed medications used to treat disabilities. Examples of such policies are those that: (1) define drugs, either expressly or implicitly, as including lawfully-prescribed medications; (2) prohibit employees from taking such prescription medications at the worksite or require them to disclose the existence of a disability or prescription medications they are taking; or (3) preclude the use of any prescription drugs that could hypothetically increase the "*potential*" for accidents, absenteeism or substandard performance.

Both the ADA and California's Fair Employment and Housing Act (FEHA) are broad with respect to what constitutes a "disability" covered by those statutes.[4] An individual who is taking lawfully-prescribed medications to treat any one of myriad medical conditions may be a protected individual with a disability under those statutes, and it would violate their rights to take any sort of adverse employment action resulting from their use of such medications.[5] Additionally, it is unlawful for an employer to require an employee with a disability to disclose either the nature of their medical condition (aside from identifying medical restrictions for which they may require accommodation) or the type of medications the employee is taking.[6] Thus, encompassing prescription medications within the category of a drug-free workplace policy and requiring the employee to disclose the use of such medications potentially violates both the ADA and FEHA.

Precluding the use of lawfully-prescribed medications that could hypothetically present safety concerns may also violate the ADA and FEHA. In order to prove that use of a prescription drug poses a threat to the health or safety of the employee or others, an employer must establish a *significant risk and imminent likelihood of substantial harm*, based on reasonable medical judgment.[7] Accordingly, the employer cannot substitute its own judgment in place of a medical determination that the employee's prescription drug use would result in imminent and substantial harm. Moreover, even if a safety threat actually exists, an employer must engage in an interactive process with the affected employee to determine if any reasonable accommodation exists that would eliminate the threat.[8]

2. **DON'T** Include Random Drug Testing

Although some limited drug testing of employees is allowed in California, it may be justified only in strictly defined circumstances. The United States Supreme Court has held that the collection and testing of public employees' biological samples is a search within the meaning of the Fourth Amendment and therefore must be reasonable.[9] While in criminal cases, a government agency must generally have a warrant or probable cause for drug testing,[10] courts have slightly relaxed the standard for public employers' drug testing of current employees.[11] For example, a public employer may conduct a drug test where reasonable suspicion exists that an employee is impaired by drugs or alcohol at the worksite or while being compensated for on-call duty, including where there is some level of individualized suspicion based on factors such as slurred speech, bizarre conduct, uncharacteristically poor work performance, and excessive accidents or tardiness.[12] Moreover, and as discussed further below, certain public safety employees, such

as Department of Transportation drivers and operators, are subject to broader testing.[13]

While random drug testing is generally not permitted in the public sector due to employees' Constitutional rights of privacy and freedom from unauthorized searches and seizures, public employers should still have policies in place for drug testing when the situation warrants; however, the policies should be clear and require appropriate documentation by the employee's supervisor or department head as to the probable cause for the drug test.[14]

[E]mployers must be on the lookout for, and remain vigilant against, the inclusion of overbroad and/or vague restrictions in drug and alcohol policies that could inadvertently violate legal protections to employees

Public employers must also note that while testing for illegal drugs is not considered a "medical examination" under the ADA, testing for alcohol or legal drugs is.[15] Testing for alcohol use may also be considered a medical examination under California law. In any event, the standards for conducting alcohol testing are similar under both the ADA and FEHA insofar as the regulations governing both statutes allow for drug and alcohol testing of current employees where the employer has a "reasonable belief" that an employee may be under the influence of drugs or alcohol at work.[16] Generally speaking, both statutes permit medical examinations when "job-related and consistent with business necessity," a standard which requires a reasonable belief, based on objective evidence that, (1) an employee's ability to perform essential job functions may be impaired by a medical condition (or medications being used by the employee to treat the condition); or (2) an employee may pose a direct safety threat due to a medical condition or the treatment associated with the medical condition.[17] Disability-related inquiries and medical examinations that follow up on an employee's request for reasonable accommodation also may be job-related and consistent with business necessity.[18] In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.[19] For example, public employers may require periodic medical examinations of employees in public safety positions that are narrowly tailored to address specific job-related concerns (e.g., firefighters may be required to undergo periodic vision tests and an annual electrocardiogram because defects could affect their ability to perform their jobs without posing a direct threat; however, police departments may not periodically test officers for HIV status because a diagnosis of that condition alone is not likely to result in an impaired ability to perform essential functions that would pose a direct threat to safety).[20] Additionally, an employee who has been off from work in an alcohol rehabilitation program may be subject to periodic alcohol testing when he or she returns, but only in specific situations where the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat in the absence of periodic testing. Again, such a belief requires an individual assessment of the employee based on objective evidence, and cannot be based on general assumptions.[21]

3. **DON'T** Punish Employees Who Enter Rehabilitation Programs

Another important "DON'T" with respect to workplace drug and alcohol policies pertains to employees who enter rehabilitation programs. First, it is well-settled that the current use of illegal drugs is not considered a disability under the ADA or FEHA.[22] Accordingly, a public employer is within its rights to take into consideration an employee's current illegal drug use in disciplinary decisions.[23]

Nevertheless, under the ADA, an individual may have a protected disability where he or she has successfully completed a supervised drug rehabilitation after engaging in illegal drug use, has otherwise been rehabilitated successfully and (1) is no longer engaging in illegal drug use or (2) is currently participating in a supervised rehabilitation program and no longer engaging in illegal drug use.[24]

Individuals who are currently in a program or have undergone rehabilitation would also be protected under FEHA, even though the statute does not specifically address individuals who are currently enrolled, or have previously completed, a rehabilitation program.[25] This is attributable, in

part, to the fact that while FEHA does not specifically address recovering drug users, it does intentionally encompass a broader definition of "disability" than the ADA, insofar as the statute includes physical and mental conditions that merely "limit" any major life activities (as contrasted to disabilities under the ADA, which must "substantially limit" major life activities).[26] Under that more lenient standard, alcoholism and similar addiction are recognized as a qualified disability and have been interpreted as such by the Fair Employment and Housing Commission.[27]

Again, because courts tend to broadly interpret both FEHA and the ADA, public employers should avoid including punitive language in drug and alcohol policies that could conceivably apply to employees who are currently or previously enrolled in rehabilitation programs and who are not presently engaging in drug or alcohol use.

DRUG AND ALCOHOL POLICY "DOS"

1. **DO** Include Language Carving Out Exceptions For The Use Of Lawfully-Prescribed Medications

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 creates a direct threat to the health or safety of the employee or others, and even then, the employer must engage in an interactive process to determine if a reasonable accommodation can eliminate that threat.[28]

Accordingly, the policy should make explicit that prescription medications are not prohibited when taken in standard dosage or according to a lawful prescription. The policy 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.

2. **DO** Establish A Clear Policy For When You Will Require Drug Or Alcohol Testing

A good workplace drug and alcohol policy should provide a readily understandable statement as to when drug or alcohol testing may be required. Courts have generally supported employers who require drug and alcohol testing if specific objective facts, and rational inferences drawn from those facts, indicate drug or alcohol abuse. Even though such facts and inferences may fall short of probable cause, courts have ruled in favor of public employers if they reflect reasonable individualized suspicion.[29] Any workplace policy should mandate that the affected employee's supervisor or applicable department head keep a clear record and promptly reduce to writing the specific circumstances giving rise to the drug or alcohol test.

In addition, courts have upheld drug and alcohol testing of employees where a serious accident has occurred that involved human error, particularly in "safety-sensitive" positions.[30] Again, employers must exercise caution in conducting random drug and alcohol testing in such circumstances, avoid the testing of employees who were not substantially involved, and carefully document the situation and the particular employee's involvement.

3. **DO** Grant Leave For Employees To Attend Rehabilitation Programs

As explained above, 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 covered by the disability provisions of the ADA and FEHA.[31] 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 be ground for discipline.

4. **DO** Make Clear That Medical Marijuana Use Constitutes A Violation Of The Drug-Free Workplace Policy

A common issue in California relates to the use of medical marijuana. Medical marijuana is a major exception to the general prohibition against disciplining an employee for the usage of lawfully-prescribed medications.

In 2008, the California Supreme Court issued a decision in *Ross v. RagingWire Telecommunications, Inc.*, providing that employers do not have to accommodate the use of medical marijuana under FEHA or California's Compassionate Use Act of 1996.[32] Under the Compassionate Use Act, the Legislature absolved medical marijuana users with valid prescriptions from criminal prosecution under California law.[33] The California Supreme Court,

however, found that the Act does not speak to employment law and does not alter the general rule that an employer need not permit the use of illegal substances in the workplace.[34] As the Court noted in *RagingWire*, marijuana use still remains illegal under federal law.[35]

The *RagingWire* decision emphasizes that an employee's termination for medical marijuana use does not support a claim for wrongful termination in violation of public policy or a claim under FEHA. Likewise, based on the express language of the ADA, an employer need not permit current illegal drug use, so employers who discipline employees for medical marijuana use are also not subject to liability under federal law.[36]

5. **DO** Acknowledge Drug And Alcohol Testing Exceptions That Apply To Transportation Employees Or Other "Safety-Sensitive" Environments

While requirements applicable to commercial transportation employers and operators are too extensive to be addressed in detail in this article, public employers must be aware that state and federal laws impose strict requirements on entities engaged in commercial transportation with respect to drug and alcohol testing.[37] For instance, every employer who employs drivers of "commercial motor vehicles" or operates a transit system in an urban area must comply with the U.S. Department of Transportation regulations, which require the employer to adopt a drug and alcohol testing policy for employees in safety-specific positions.[38] Failure to comply with these regulations can result in significant penalties both to employees and individual operators. The most common areas in which courts have upheld random drug and alcohol testing are in transportation and public safety positions.[39]

6. **DO** Include Reference To Employee Assistance Programs

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.

Public employers' drug and alcohol policies should actively encourage employees who believe they have a drug or alcohol problem to seek assistance.

CONCLUSION

It is critical for public employers to maintain well-crafted drug and alcohol policies and to be aware of common traps and pitfalls that could potentially expose them to EEOC enforcement actions, litigation, and penalties. Above all, employers must be on the lookout for, and remain vigilant against, the inclusion of overbroad and/or vague restrictions in drug and alcohol policies that could inadvertently violate legal protections to employees. While hopefully these practice tips are useful for *all* employers, public employers are often held to a higher standard and subject to more scrutiny, regulation and enforcement than their private sector counterparts, particularly with respect to challenges concerning privacy issues and the public employers' duty to maintain a safe and healthy workplace.

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Endnotes

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 *See, e.g.,* EEOC Press Release dated April 22, 2015 (http://www.eeoc.gov/eeoc/newsroom/release/4-22-15b.cfm) ($59,000 settlement by employer alleged to have engaged in unlawful disability-related inquiries and medical examinations of employees and to have required all employees to disclose prescribed medications and over-the-counter drugs to management, including circumstances where the medications did not affect performance and employee had been cleared to work by doctor); EEOC Press Release dated September 5, 2012 (http://www.eeoc.gov/eeoc/newsroom/release/9-5-12.cfm) ($750,000 settlement after EEOC alleged automotive plant employees were unlawfully tested for legally prescribed medications in violation of ADA); EEOC Press Release February 5, 2012 ($40,000 settlement for employer allegedly requiring in workplace policy that all employees must report whether they were taking any prescription or over-the-counter medication); *see also Roe v. Cheyenne Mountain Conference Resort, Inc.* (10th Cir. 1997) 124 F.3d 1221 (employer's policy requiring all employees to report every drug, including legal prescription drugs, violated ADA); *Krocka v. Bransfield* (N.D. Ill. 1997) 969 F. Supp. 1073 (police department unlawfully implemented policy of monitoring employees taking psychotropic medications).

4 FEHA's definition of "disability" is extremely broad and essentially comprises any mental or physical condition that "limits a major life activity." *See* Cal. Gov. Code § 12926(j)-(m) (mental disability includes "[h]aving any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity...."; physical disability includes "[h]aving any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine." (B) Limits a major life activity." Under FEHA, "major life activities" are "broadly construed and include[] physical, mental, and social activities and working." Gov. Code § 12926(m)(1)(B)(iii). The definition of "disability" under the ADA is also very broad, but slightly narrower in the sense that it relates to an individual with "[a] physical or mental impairment that *substantially* limits one or more of the major life activities of such individual." *See* 29 C.F.R. § 1630.2(g)-(h) (emphasis added.)

5 *See, e.g., Yanowitz v. L'OrealUSA, Inc.* (2005) 36 Cal.4th 1028, 1036.

6 *See, e.g.,* Cal. Civ. Code § 56.10(c)(8)(B); 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); California Department of Fair Employment & Housing Fact Sheet (http://www.dfeh.ca.gov/res/docs/publications/dfeh-161.pdf)

7 29 C.F.R. § 1630.2(r)(1)-(4).

8 *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169 (employer bears burden of proof for establishing affirmative defense of direct threat to health and safety, quoting Gov. Code § 12940(a)(1)); *Witt v. Northwest Aluminum Co.* (2001 D. Or.) 177 F.Supp.2d 1127 (employer's failure to provide evidence that it engaged in interactive process prevents granting of summary judgment on direct threat defense under ADA); *E.E.O.C. v. Hibbing Taconite Co.* (D. Minn. 2010) 720 F. Supp. 2d 1073, 1082-83 (employer must show that any threat posed could not be eliminated by reasonable accommodation after engaging in interactive process).

9 *Skinner v. Railway Labor Executives' Ass'n* (1989) 489 U.S. 602, 616-617 (collection and testing of blood and urine constitutes a search within the scope of the Fourth Amendment). For an excellent overview of issues relating to drug and alcohol testing in general, *see* Barsook, Platten & Vendrillo, *California Public Sector Employment Law* (Matthew Bender 2015), § 5.01[5] (authored by Timothy G. Yeung and Donna Mooney).

10 *See Payton v. New York* (1980) 445 U.S. 573, 586; *Mincey v. Arizona* (1978) 437 U.S. 385, 390.

11 Standards for drug testing of applicants, as opposed to current employees, are generally lower because the employer does not have the opportunity to observe indicia of drug use as it would with current employees. *See Loder v. City of Glendale* (1997) 14 Cal.4th 846 (allowing suspicionless drug testing); *but see Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147 (calling scope of *Loder* into question.

12 *See Kraslawsky v. Upper Deck, Inc.* (1997) 56 Cal.App.4th 179; *see also Skinner*, *supra*, 489 U.S. at pp. 623-624.

13 49 C.F.R. § 40 *et seq.*

14 *See* 86 A.L.R. Fed. 420.

15 42 U.S.C. § 12114(d)(1); *see also Leonel v. American Airlines, Inc.* (9th Cir. 2005) 400 F.3d 702, 706, 713. Note also that the substances the employer may be testing are important and notice to the employee regarding the type of tests (e.g., blood, urine) that are to be performed is likely to be factored into a court's analysis with respect to litigation over improper testing. *See id.*

16 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#5); 22 C.C.R. § 7294.2(d)(2) (http://www.dfeh.ca.gov/res/docs/FEHC%20Disability%20Regs/FEHC%20FINAL_DISABILITy_REGS_12-18-12%20_2_.pdf).

17 *Ibid.*

18 *See* EEOC Enforcement Guidance, *supra*, note 16.

19 *Ibid.*

20 *Id.*, questions 18-19 and accompanying text.

21 *Ibid.*

22 42 U.S.C. § 12114(a); Cal Gov. Code § 12696 subds. (j)(5), (m)(6).

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

24 42 U.S.C. § 12114 (b)(1-3); *see also* Gov. Code § 12940.

25 42 U.S.C. § 12102; Gov. Code §§ 12926, 12926.1(a).

26 *Ibid.*

27 Cal. Code Regs., Tit. 2, § 7294.2(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 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).

28 29 C.F.R. 1630.2(r)(1)-(4); *Hibbing Taconite Co.*, *supra*, 720 F. Supp. 2d at pp. 1082-1083.

29 *Skinner*, *supra*, 489 U.S. at pp. 623-624.

30 *Id.* at 628 ("special need" for suspicionless post-accident testing in "safety-sensitive" positions where railroad employees performed duties posing substantial risk of injury to others, which may extend to other high regulated industries as well as certain government offices, schools and prisons).

31 *See* notes 25-27, *supra*. 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, likewise protects recovering alcoholics (assuming current use is not interfering with work) even if not necessarily attending rehabilitation.

32 *See RagingWire Telecommunications*, 42 Cal.4th 920.

33 Cal. Health & Safety Code § 11362.5(c)-(d).

34 *RagingWire Telecommunications*, 42 Cal.4th at pp. 928-931.

35 *RagingWire Telecommunications*, 42 Cal.4th at pp. 927-928.

36 42 U.S.C. § 12114(a); *Brown v. Lucky Stores, Inc.*, *supra*, 246 F.3d 1182, 1187.

37 49 C.F.R. § 40 *et seq.*

38 *Ibid.*

39 For example, the Ninth Circuit Court of Appeals has upheld random drug testing for interstate truck drivers and air traffic controllers. *International Brotherhood of Teamsters v. DOT* (9th Cir. 1991) 932 F.2d 1292; *Bluestein v. Skinner* (9th Cir. 1990) 908 F.2d 451. Additionally, federal courts have approved random testing in the medical industry and in work for the military. *See American Federation of Gov't Employees, Council 33 v. Barr* (N.D. Cal. 1992) 794 F.Supp. 1466; *AFGE Local 1533 v. Cheney* (9th Cir. 1991) 944 F.2d 503.