

## LEGALIZED MARIJUANA IN CALIFORNIA AND ITS IMPACT ON WORKPLACE POLICIES



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# |AGENDA



INTRODUCTION



LEGAL FRAMEWORK OF  
PERSONAL USE AND  
MEDICAL MARIJUANA



PRE-EMPLOYMENT AND  
EMPLOYEE TESTING,  
WORKPLACE  
ACCOMMODATION



EMPLOYER  
PRACTICES

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## INTRODUCTION

Welcome!

This presentation will review the impact of new legislation in California, Proposition 64, the “*Control, Regulate and Tax Adult Use of Marijuana Act*” (referred to as the “*Adult Use of Marijuana Act*”), on workplace policies, in addition to the Act’s interaction with:

- the federal “*Controlled Substances Act*.”
- California’s “*Compassionate Use Act*”: and,
- the California Supreme Court’s decision in *Ross v. RagingWire*.

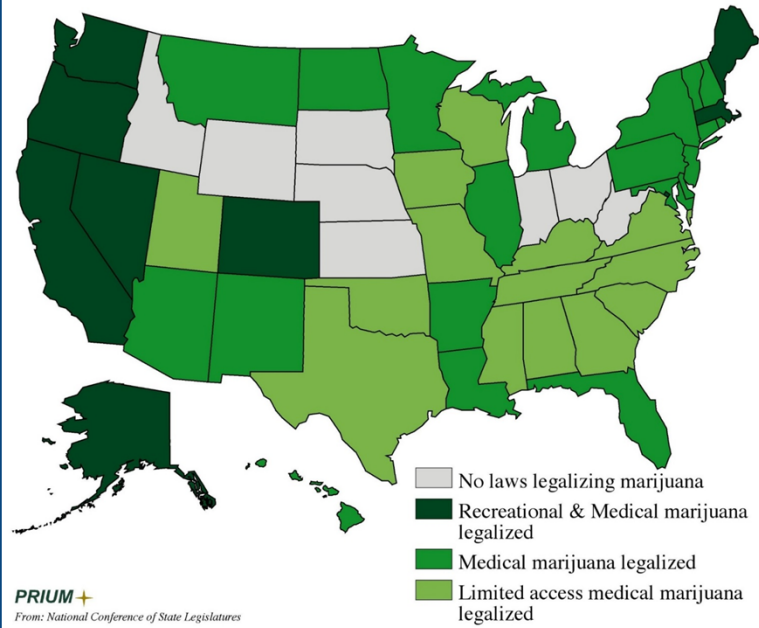
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## QUESTIONS

Since marijuana is now legal in California:

- Can employers screen applicants for marijuana use?
- Can employers test current employees for marijuana use?
- Must employers accommodate the use of medical marijuana?
- Can employers conduct post-workplace accident drug testing, including screening for marijuana?

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## | BUT IT'S ACCEPTED

- Per February 2017 Quinnipiac poll ...

**59% say marijuana should be legal**

**93% say medical marijuana should be legal**

**71% say federal laws should not be enforced**

<https://www.mpp.org/wp-content/uploads/2017/02/Quinnipiac-Poll-Feb-2017.pdf>

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## | AND Y'ALL VOTED

- California Proposition 64

**55.8% = yes**

**44.2% = no**

**The proposition calls for legalizing marijuana for adults 21 and older. Smoking would be permitted in private homes or at businesses licensed for on-site marijuana consumption. Medical marijuana was legalized in California in 1996.**

[https://ballotpedia.org/California\\_Proposition\\_64,\\_Marijuana\\_Legalization\\_\(2016\)](https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_(2016))  
)

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## | CAN YOU FIRE 'EM?

- *Ross v. RagingWire Telecommunications, Inc.*  
(2008) 42 Cal. 4th 920

Court found no fundamental public policy requiring employers to accommodate marijuana use by employees

“Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions.”

Colorado, New Mexico, Michigan too.

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## | PROP 64 & DRUG FREE POLICY

- Health & Safety Code §11362.45

Nothing in this law will “amend, repeal, affect, restrict, or preempt... [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.”

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## | BUT SHOULD YOU TEST 'EM?

- Pre-employment / post-accident testing

Workplace safety implications?

Empty seats?

RTW?

Liability?

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## | IMPAIRMENT IS IMPAIRMENT



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## | BUT PRESENCE <> IMPAIRMENT

- It's complicated.

### Single use

urine = 1-7+ days

blood = 12-24 hours

### Regular use

urine = 7-100 days

blood = 2-7 days

hair = months

3.1-4.5 ng/mL (oral) and 3.3-4.5 ng/mL (smoked) plasma levels = 0.05 g% blood alcohol concentration (BAC)

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## | IS IT MEDICINE?

- Six states where reimbursement by work comp has occurred:

Connecticut

Maine

Massachusetts

Minnesota

New Jersey

New Mexico



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## | LAND OF ENCHANTMENT

### CANNABIS PROGRAM

75% registered for chronic pain or PTSD  
230 dry grams / calendar quarter  
may be adding “opiate use disorder”

### WORK COMP

Court decisions = reasonable & necessary  
nvoluntary and voluntary  
Work Comp fee schedule - \$12.02/dry gram

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## | CALI CAN'T

### ▪ California Health and Safety Code §11362.785(d):

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

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## | IT'S ABOUT EFFICACY

### ▪ Minnesota

**PTP recommended cannabis for chronic pain and muscle spasms**

- carrier did not pay

**IME concurred that it was “reasonable and necessary”**

- carrier did not appeal
- carrier paying \$100/month

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## | CHRONIC PAIN?

### ▪ *National Academies of Sciences, Engineering and Medicine*

**studied all research since 1999**

**10,000 scientific abstracts**

**100 conclusions**

**in regards to chronic pain in adults ...**

**“The committee found evidence to support that patients who were treated with cannabis or cannabinoids were more likely to experience a significant reduction in pain symptoms”**

<http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625>

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*RUH ROH*

## | GUIDING PRINCIPLE

- **American Society of Addiction Medicine**

**“For every disease and disorder for which marijuana has been recommended, there is a better, FDA-approved medication.”**

## | SO WHAT NEXT?

- Review your ...

**Drug-free policy with explicit focus on marijuana;  
pre-employment, post-accident testing policies;  
medical use policy;  
reimbursement policy;  
do not bury your head in the sand.**



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## FEHA AND ADA

## **| KEY DISABILITY RELATED STATUTES FOR EMPLOYERS TO CONSIDER**

- **Fair Employment and Housing Act (FEHA)**  
**(Government Code section 12900 et seq.)**
- **Americans with Disabilities Act (ADA)**  
**42 U.S.C. § 12101 et seq.**

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## **| ILLEGAL DRUG USE UNDER THE FEHA/ADA**

- **Currently illegal drug use is not a disability under the FEHA or the ADA:**
  - **Employers may make hiring and disciplinary decisions based on an employee's current illegal drug use.**
- **A psychoactive substance use disorder resulting from current illegal drug use is not a disability under the FEHA or the ADA.**

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## | FEHA AND MEDICAL MARIJUANA

- FEHA: Employers are not required to accommodate the use of medical marijuana;
- The *Compassionate Use Act* only protects from state criminal prosecution; The Act cannot circumvent legitimate business interests involving drugs that are banned under federal law.

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## | ROSS V. RAGING WIRE TELECOMMUNICATIONS, INC.

- In 2008, the California Supreme Court upheld the right of an employer **not to hire** an applicant who tested positive for medical marijuana.
- The Court held employers could rely on federal law (the *Controlled Substances Act*) to enforce their workplace substance abuse policies prohibiting the use of marijuana, including medical marijuana.

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## **| FACTS OF *ROSS V. RAGINGWIRE***

- Gary Ross suffered from strain and muscle spasms in his back as a result of injuries he sustained while serving in the United States Air Force.
- After failing to obtain relief from pain through other medications, plaintiff began to use marijuana on his physician's recommendation pursuant to the *Compassionate Use Act*. On September 10, 2001, defendant RagingWire Telecommunications, Inc., offered plaintiff a job as lead systems administrator.

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## **| FACTS OF *ROSS V. RAGINGWIRE***

- Defendant required plaintiff to take a drug test. Before taking the test, plaintiff gave the clinic a copy of his physician's recommendation for marijuana. Plaintiff took the test on September 14 and began work on September 17. Later that week, the clinic informed plaintiff that he had tested positive for marijuana.
- Ragingwire then informed Ross he was being suspended as a result of the drug test and he was subsequently terminated. Ross then sued for disability discrimination under the Fair Employment and Housing Act (FEHA). Both the trial court and appellate court ruled in favor of Ragingwire and Ross appealed to the California Supreme Court.

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## WHAT DID THE CALIFORNIA SUPREME COURT SAY IN *ROSS V. RAGINGWIRE*?

- “Plaintiff's position might have merit if the *Compassionate Use Act* gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users”

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## *ROSS V. RAGING WIRE TELECOMMUNICATIONS*

- The Court held that the *Compassionate Use Act* does not grant marijuana the same status as a legal prescription drug and that since marijuana is illegal under federal law, it cannot be “completely legalize[d] for medical purposes.”
- The Court reasoned that, since the California Fair Employment and Housing Act does not require employers to accommodate illegal drug use, an employer may lawfully terminate the employee for using medical marijuana.

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## **ROSS V. RAGING WIRE TELECOMMUNICATIONS INC.**

- The Court noted that, although the *Compassionate Use Act* prohibits people who use marijuana under the care of a physician from being charged criminally, the Act does not grant marijuana the same status as a legal prescription drug.

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## **ROSS V. RAGING WIRE TELECOMMUNICATIONS INC.**

- “Marijuana, as noted, remains illegal under federal law because of its ‘high potential for abuse,’ its lack of any ‘currently accepted medical use in treatment in the United States,’ and its ‘lack of accepted safety for use ... under medical supervision.’”

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## **ROSS V. RAGING WIRE TELECOMMUNICATIONS**

- *RagingWire* is still relevant to the extent the FEHA does not require an employer to accommodate an employee's use of medicinal marijuana.
- *RagingWire*, however, could be subject to increased challenges as states continue to adopt laws that allow marijuana use.

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## **COATS V. DISH NETWORK LLC**

- On June 7, 2010 Dish Networks LLC fired Brandon Coats for violating the company's drug policy after a random drug test showed Coats was using marijuana.
- Coats is a quadriplegic who has been confined to a wheelchair since he was a teenager. He started working at Dish in 2007 as a telephone customer service representative. In 2009, Coats obtained a state-issued license for medical marijuana. He had informed the company he was a medical marijuana patient and planned to continue using marijuana.
- It was undisputed that Coats was a model worker in every respect and that his termination had nothing to do with his performance

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## ***COATS V. DISH NETWORK LLC***

- After Dish Networks fired Coats, he filed a wrongful termination lawsuit against Dish, citing to Colorado's "Lawful Activities Statute" which provided that it shall be a "discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours."
- Coats alleged that his medical marijuana usage was a lawful activity and therefore Dish could not terminate him for his positive test result. Dish filed a motion to dismiss, arguing that Coats' use of marijuana was not "lawful" for purposes of state and federal law. The trial court dismissed Coats' complaint for failure to state a claim after finding that medical marijuana use was not "lawful" under Colorado state law. The Colorado Court of Appeals affirmed.

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## ***COATS V. DISH NETWORK, LLC***

- The Colorado Supreme Court reviewed the question of whether medical marijuana use prohibited by federal law was a "lawful activity" for purposes of the statute. The court determined that the definition of "lawful" was not confined just to what was lawful under state law. **The court then stated that marijuana use was unequivocally illegal under federal law and there was no recognized exception for medical marijuana under federal law. The court held that because Coats' medical marijuana use was unlawful under federal law, it was not a "lawful activity."**
- The Colorado Supreme Court affirmed the court of appeals and found that Coats was not wrongfully terminated as a result of his medical marijuana use.

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## | WHAT COULD CHANGE?

### FEDERAL LAW COULD CHANGE GAME CHANGER

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## | GAME CHANGER- IF FEDERAL LAW CHANGES

- On March 30, 2017, five bills pertaining to marijuana were introduced in Congress. Three from Oregon lawmakers regarding taxes, baking restrictions and descheduling marijuana; Representative Jared Polis reintroduced his 2015 legislation that proposes to regulate marijuana like alcohol, and another bill provides individuals in states with legalized marijuana additional protections from federal prosecution.

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## DESCHEULING

- The *Marijuana Revenue and Regulation Act* would remove marijuana from its federal classification as a “Schedule 1” drug and end federal prohibition in the *Controlled Substances Act*.

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## BANKING AND TAXES

- Many banks refuse to do business with marijuana companies due to the possibility of criminal charges for a violation of federal law. The *Policy Gap Act* creates some safeguards and also allows marijuana companies to declare bankruptcy, if necessary.
- The *Small Business Tax Equity Act* amends the tax code so that a company in compliance with state law may claim business deductions on their federal taxes. Currently, marijuana businesses are prohibited from claiming such deductions with the IRS.

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## CRIMINAL RECORDS AND DRUG TESTING

- The *Policy Gap Act* provides that certain marijuana drug offenders who were convicted under federal law may seek "expungement" of their criminal record if they convicted of possessing an ounce or less of marijuana. However, it only covers individuals who were arrested and prosecuted for a federal crime in a state where marijuana was legal at the time of arrest.
- The bill prohibits drug-testing applicants for federal jobs in states where marijuana is legal.

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## INCREASED STATE PROTECTIONS

- Pursuant to the *Responsibly Addressing the Marijuana Policy Gap Act*, any person acting in compliance with state marijuana law would not be subject to criminal penalties under the *Controlled Substances Act*.

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## PRE-EMPLOYMENT

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### QUESTIONS EMPLOYERS MAY CURRENTLY ASK

- **Employers may ask job applicants about current illegal drug use;**
- **If ever been convicted of driving under the influence of alcohol.**
- **However, new FEHA regulations on background checks will be in effect as of July 1, 2017.**

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## QUESTIONS EMPLOYERS MAY NOT ASK

- Employers may **not** ask job applicants about:
  - Former illegal drug use or addiction;
  - Treatment for alcohol or illegal drug use;
  - Legal medications prescribed by a physician that might reveal an applicant's physical or mental disability.

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## DRUG TESTING / PRE-EMPLOYMENT

- Employers **may not** administer a drug test before making an offer of employment;
- However, once a job offer is made, employer may administer a drug test, when passing a drug test is a condition of employment, if:
  - Candidates are given notice that drug and alcohol testing will be part of the application process;
  - Testing will be minimally intrusive;
  - There are safeguards to restrict access to testing results.
- Questions – In light of Prop. 64, will there be difficulty finding qualified workers?

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## **| PROP 64 AND DRUG TESTING JOB APPLICANTS**

- **Prop 64 does not prohibit employers from conducting pre-employment drug testing of job applicants.**
- **However, employers should advise job applicants prior to a pre-employment drug test that marijuana will be tested and whether employment will be denied if the test is positive.**

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## **DRUG TESTING CURRENT EMPLOYEES**

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## DRUG TESTING OF CURRENT EMPLOYEES

- A **higher standard exists** for conducting a drug test for current employees;
- Constitutional rights to privacy;
- Employer's interests must outweigh employee's reasonable expectation of privacy;

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## DRUG TESTING OF CURRENT EMPLOYEES

- Reasonable suspicion basis for testing current employees;
- **Balancing Test:**
  - Amount of intrusion into the employee's privacy;
  - Importance of safety in the workplace;
  - Type of work performed by employee;
  - Other employer considerations pertaining to business necessity.

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## DRUG TESTING OF CURRENT EMPLOYEES

- Reasonable suspicion and marijuana:
  - Unique challenge for marijuana;
  - No uniformity of effect;
  - Looking “high”;
- Training on reasonable suspicion is paramount.

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## MAY AN EMPLOYER CONDUCT RANDOM DRUG TESTING OF CURRENT EMPLOYEES?

- In general-**no**. Random drug testing may only be conducted for employees in safety sensitive positions, where public safety or the protection of life, property or national security is at issue;
- For example, truck drivers, airline pilots, and certain correctional officers.

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## NEW OSHA STANDARD FOR POST-ACCIDENT DRUG TESTING

- Employers need not specifically suspect drug use before post-incident testing, but there should be a **reasonable possibility that drug use by the reporting employee could have contributed to the reported injury or illness.**
- **In effect as of December 1, 2016.**

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## OSHA- POST-ACCIDENT TESTING

- **The rule does not prohibit drug testing of employees, including drug testing pursuant to the Department of Transportation rules or any other federal or state law.** It only prohibits employers from using drug testing, or the threat of drug testing, to retaliate against an employee for reporting an injury or illness.
- Employers may conduct post-incident drug testing pursuant to a state or federal law, including *Workers' Compensation Drug Free Workplace* policies, because section 1904.35(b)(1)(iv) does not apply to drug testing under state workers' compensation law or other state or federal law. Random drug testing and pre-employment drug testing are also not subject to section 1904.35(b)(1)(iv).

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## OSHA-POST-ACCIDENT DRUG TESTING

- Employers may conduct post-incident drug testing **if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness.**
- However, if employee drug use could not have contributed to the injury or illness, post-incident drug testing would likely only discourage reporting without contributing to the employer's understanding of why the injury occurred. Drug testing under these conditions could constitute prohibited retaliation.

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## OSHA EXAMPLE SCENARIO

- Scenario 1: Employer required Employee X to take a drug test after Employee X reported work-related carpal tunnel syndrome. Employer had no reasonable basis for suspecting that drug use could have contributed to her condition, and it had no other reasonable basis for requiring her to take a drug test. Rather, Employer routinely subjects all employees who report work-related injuries to a drug test regardless of the circumstances surrounding the injury. The state workers' compensation program applicable to Employer did not address drug testing, and no other state or federal law requires Employer to drug test employees who sustain injuries at work.
- **Question: Did Employer violate section 1904.35(b)(1)(iv) by subjecting Employee X to a drug test simply because she reported a work-related injury?**

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## ANSWER

- Answer: **Yes.** Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries. Rather, employers must have a legitimate business reason for requiring a drug test, such as a reasonable belief that drug use contributed to the injury.
- If drug use could not reasonably have contributed to a particular injury and the employer has no other reasonable basis for requiring a drug test, section 1904.35(b)(1)(iv) prohibits the employer from drug testing employees simply because they report injuries unless the drug test is conducted pursuant to a state workers' compensation law or other state or federal law.

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## OSHA EXAMPLE SCENARIO

- Scenario 2: Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment, and he reported the injury to Employer. Employer required Employee X to take a drug test.
- Question: Did Employer violate section 1904.35(b)(1)(iv) for drug testing Employee X?
- Answer: No. Because Employee X's conduct—the manner in which he operated the forklift—contributed to his injury, and because drug use can affect conduct, it was objectively reasonable to require Employee X to take a drug test after Employer learned of his injury. Drug testing an employee who engaged in conduct that caused an injury is objectively reasonable because conduct can be affected by drug use.

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## REHABILITATION LEAVE

- California employers with 25 or more employees must make reasonable accommodations by providing unpaid time off for any employee who voluntarily enters and participates in a drug or alcohol rehabilitation program, as long as it does not impose an undue hardship on the employer.
- Pursuant to the Labor Code provides that employees may use accrued sick leave during this period. Employers may also allow employees to use accrued vacation leave or other paid time off. The duration of the time off is tied to the duration of the program. FMLA/CFRA may also apply.

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## EMPLOYER PRACTICES

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## WORKPLACE POLICIES ON SUBSTANCE ABUSE

### Employers must:

- Decide whether to keep existing substance abuse policies in place, and continue testing applicants for marijuana **or** discontinue testing for marijuana;
- Decide whether to accommodate the use of medical marijuana for applicants/current employees;
- Update substance abuse policy with any changes.

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## WORKPLACE POLICIES ON SUBSTANCE ABUSE

- Employers must uniformly and consistently apply substance abuse policies to all employees;
- Substance abuse policies should be in writing, and:
  - Provide notice to all employees;
  - Obtain signed proof of employee's knowledge and consent.

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## WRITTEN SUBSTANCE ABUSE POLICY-KEY PROVISIONS

- **Clear, written policy** that no use, possession, or sale of marijuana is allowed;
- May not report to work under the influence of marijuana (even medical marijuana);
- Policy violations can lead to disciplinary measures including termination;
- The criteria / policy regarding drug testing.

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## WRITTEN POLICY CONTINUED...

- Information regarding an employee's right to time off for rehabilitation purposes;
- **Information about ADA/FEHA:**
  - The employees' rights and protections;
  - The availability of a reasonable accommodation.

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## TRAIN MANAGERS AND SUPERVISORS

- Employer's policies and procedures;
- Reasonable **suspicion** versus random testing;
- **Signs** of intoxication/substance abuse;
- **Steps** to take if suspicion of on duty alcohol/illegal substance;
- Designate managers/supervisors to receive specialized training on detection and response.

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## INFORM EMPLOYEES

- All employees are informed about the workplace substance abuse policy;
- The policy is consistently and uniformly enforced;
- The policy is **signed and acknowledged** by all employees.

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## REASONABLE SUSPICION BASED DRUG TESTING

- Always use “reasonable suspicion based” drug testing;
- No random testing unless applicable exception;
- Supervisors and managers:
  - **Must have a reasonable suspicion prior to testing;**
  - Clearly document neutral observations (forms);
  - Are trained on reasonable suspicion criteria.
- The courts have upheld testing after a serious accident.

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## CONCLUSION

- Create and enforce appropriate workplace **policies;**
- **Train** managers and supervisors;
- **Educate** employees;
- Incorporate EAP services;
- Reduce stigma in the workplace:
  - Open door policy;
  - Emphasize employees’ rights to **privacy;**
- **Document** observations and facts when drug testing.

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# SPEAKER BIOS

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- CREATED PRIUM'S AWARD-WINNING CHRONIC PAIN INTERVENTION PROGRAM IN 2003, INTERVENTION TRIAGE IN 2010, TEXAS CLOSED FORMULARY TURNKEY IN 2011, CENTERS WITH STANDARDS IN 2012, TAPERRX IN 2014
- FROM MARCH 2012 THRU FEBRUARY 2017 ...
  - 398 PRESENTATIONS, 29,045 PEOPLE, 40 STATES + DC
  - 16 NATIONAL WEBINARS
- PUBLISHED AND QUOTED IN CLM MAGAZINE, RISK & INSURANCE, BUSINESS INSURANCE, WORKCOMP CENTRAL, WORKCOMP WIRE, INSURANCE THOUGHT LEADERSHIP, ETC
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