

**Is My Employee Drunk, Sick
or Simply Sleeping:
Training Managers on
'Reasonable Suspicion'
Based Drug Testing**



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3

INTRODUCTION

- 38-50% of all workers' compensation claims are related to substance abuse.
- Substance abusers file 3-5 times more workers' compensation claims.
- NIH reports that drug and alcohol abuse costs the economy more than \$250,000,000,000 each year.
- In 1996 medical marijuana was introduced in California under the *Compassionate Use Act* (Proposition 215).
- In November of 2016, the voters passed Proposition 64 legalizing marijuana for recreational purposes.
- The changing legal landscape causes confusion for employees and challenges for employers regarding workplace drug policies, drug use and post-accident drug testing.

4

AGENDA



KEY CRITERIA FOR
REASONABLE
SUSPICION BASED
TESTING



RECOMMENDED
TRAINING FOR
MANAGERS AND
SUPERVISORS ON
REASONABLE
SUSPICION



WORKPLACE
POLICES ON
SUBSTANCE
ABUSE



POST-ACCIDENT
DRUG TESTING

KEY CRITERIA FOR REASONABLE SUSPICION

What is reasonable suspicion?

The legal standard of proof is less than *probable cause* but more than an "inchoate and unparticularized suspicion or hunch."

Huh?

| A BIT MORE ON REASONABLE SUSPICION

- Very low standard.
- Specific and articulable facts.
- Can consider rational inferences from those facts.
- Must be associated with the specific individual.

7

| EVEN MORE ON REASONABLE SUSPICION

- Totality of the circumstances!
- Alternative, innocent explanations do not eliminate RS.
- Reviewed from perspective of an ordinary, reasonable person with same information at the time.
- Facts to establish RS can be observed before or after a workplace accident occurs.

8

DEVELOPING REASONABLE SUSPICION

- **Required abilities:**
 - Ability to recognize sensory evidence of alcohol and/or drug influence.
 - Ability to describe that evidence clearly.
- **Use your senses:**
 - Sight
 - Hearing
 - Smell

9

SIGHT

- Bloodshot eyes
- Fumbling fingers
- Alcohol containers
- Drugs or drug paraphernalia
- Swaying
- Unsteady gait
- Injection sites
- Unusual actions

10

| HEARING

- Slurred speech
- Admission of drinking
- Admission of drug use
- Inconsistent responses
- Abusive language
- Evasive responses
- Unusual statements

11

| SMELL

- Odor of alcoholic beverages
- Marijuana
- “Cover up” odors like breath spray
- Vomit
- Unusual odors

12

INTERVIEW TECHNIQUES

- The questions you ask and the way you ask them can constitute simple divided attention tasks:
 - Ask for two things simultaneously
 - Ask interrupting or distracting questions
 - Ask unusual questions

13

TRAINING SUPERVISORS

TRAINING SUPERVISORS

- On the employer's policies and procedures.
- On reasonable suspicion based drug testing versus random.
- On the signs associated with intoxication/substance abuse.
- On the appropriate steps to take if the manager/supervisor suspects an employee is under the influence of alcohol/an illegal substance while on duty.
- Designate specific managers/supervisors for each worksite who have received specialized training on detection of, and response to, intoxication/substance abuse; document this training.

15

WORKPLACE POLICIES

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- Implement a written substance abuse policy.
- A clear statement that alcohol and drug use is prohibited:
 - On Company property; or
 - During Company business hours;
 - That employees may not report to work while under the influence of marijuana (even medical marijuana);
 - That violating this policy can lead to disciplinary measures.
- The criteria/policy regarding drug testing to which the employee is subject.

17

WORKPLACE POLICIES (Continued)

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

18

POST-ACCIDENT DRUG TESTING

| POST-ACCIDENT TESTING

- **When conducting drug testing of current employees, implement reasonable suspicion based drug testing, and always refrain from random drug testing unless an exception applies.**
- **Develop policies and training that encourages your supervisors and managers to develop reasonable suspicion prior to testing employees.**

20

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;

21

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.

22

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.

23

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.

24

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 on a federal level under OSHA; not yet in effect under Cal-OSHA. Also consider whether this regulation will change under the Trump Administration.

25

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).

26

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.

27

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?**

28

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.

29

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.

30

CONCLUSION

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33

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34

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35

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37