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# Drugs & Alcohol in the Workplace



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## Stuff Our Lawyers Make Us Say

This presentation should not be relied upon as legal advice. Consult an attorney about any issues of legal significance to you & your company.



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- The Drug Free Workplace Program
- Reasonable Suspicion – What is it?
- Adult Use of Marijuana Act and its Impact on Employers
- Employee Rights Concerning Drug Testing

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## Reasons to Consider a Drug-Free Workplace Policy

### Statistical Data from the Centers for Disease Control (CDC)




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## #1 Alcohol Abuse

- 16.5% of people are unable to work due to health problems related to alcohol (4-8x greater chance of absence)
- 95,000 deaths in the US each year, including 1 in 10 total deaths among working age adults.
- NY Times reported drinking during the pandemic increased 60% among white women during the pandemic!




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## #2 Drug Abuse Exists in the Workplace

- 63% of people who self-report misuse of prescription pain relievers were employed full or part-time.
- An estimated 26.0 million Americans aged 12 or older are current users of marijuana
- 18-29 years olds are the most likely age group to smoke marijuana (22%)



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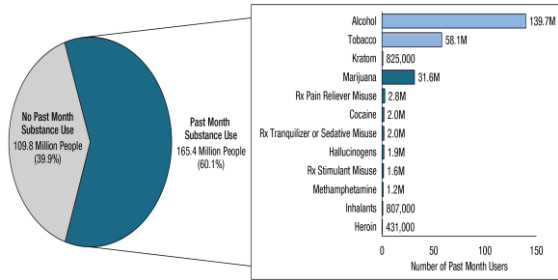
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## The National Survey on Drug Use and Health: 2019



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## Reason #3 – What is it currently costing your company?

- **81 billion each year** in lost work, healthcare costs, etc.
  - 25.5 billion in lost productivity
  - 25 billion in health care costs



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## Reason #4 Protect Your Business Accounts

- Employees terminated for positive drug test - ineligible for unemployment insurance benefits.
- Company is not liable for WC injuries when proximate cause is alcohol intoxication or illegal drug use



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## Reason #5 Because You May Have To

### US DOT REGULATIONS



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## Reason #6 – California Prop 57

- Passed in 2016 by 63% of California Voters to shrink California's prison population
- Non-violent drug offenders immediately eligible for parole
- Prison populations decreased 22% in CA in past year



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# Reason #7 – California Prop 64



In 2016 California voters passed Prop 64 which legalized nonmedical, recreational marijuana.

Legal for any adult to:

- Use marijuana recreationally (21 or older)
- Possess, transport, obtain or give away to other adults 21 or older one ounce of marijuana or 8 grams of concentrated cannabis.
- Cultivate up to six plants per residence and possess the marijuana produced by these plants.



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# On the Rise

- Marijuana is the most commonly used addictive drug after tobacco and alcohol.
- Marijuana use on the rise among baby boomers, especially men.
- The rate of US workers testing positive rose to 4.5% in 2019, the highest level in 16 years.



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## What Laws Restrict Your Right to Drug Test?



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# The California Constitution

“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy.**”



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# What About Disability Laws?

- Neither federal or CA law protects individuals who currently use drugs
- Former abuse with rehabilitation is protected
- Accommodation of current medical marijuana use not required (but new laws pending)
- Americans with Disabilities Act and California Fair Employment and Housing Act
- 25 + employees must accommodate an employee who wants to voluntarily enter rehab.



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# What about the Adult Use of Marijuana Act?

- Recreational use of marijuana for adults age 21+
- **No impact** on employer drug-free workplace policies and ability to test
- No requirement to accommodate medical marijuana
- Still illegal under federal law - a Schedule 1 narcotic (i.e. heroin, meth)
- Treat marijuana and alcohol usage the same in the workplace
  - But what if you don't want to?



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## The ABC of CBD



- Cannabidiol – or CBD – is a chemical found in marijuana or hemp
- Pure CBD does not contain THC (the psychoactive ingredient found in marijuana that produces a 'high')
- Unknowns as to effects
- 43 percent of CBD oils tested had more THC in them than labeled (American Journal of Medicine) FDA investigating
- Employees may be ingesting THC without knowing it --could test positive or be impaired
- DOT – CBD doesn't excuse positive test



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## When Can You Require Testing?

- Pre-Employment
- Post Accident
- Reasonable Suspicion
- Random

\*Advance Notice = Policy



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## Pre-Employment Testing

- Can require an applicant, as a condition of hiring, to successfully pass a pre-employment drug screening
- Not considered a medical examination, as long as not in conjunction with any pre-employment physical
- Must be **after offer** of employment and before work starts



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# Pre-Employment Testing Do's

- Be consistent in your testing (Example: all new hires or all new hires who will operate machinery)
- Designated collection site – certified lab
- Security for collection/chain of custody
- Authorized personnel
- Privacy during collection
- Integrity of the testing



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Random Testing



- The rarest of all...
- Every employee has an equal chance to be tested
- Any intrusion into an individual's privacy "must be justified by a **compelling interest**"



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# Random Testing

Limited to "Safety Sensitive" positions or where required by law (DOT)



Truck Drivers, Pipeline Workers, Aviation Personnel, Correctional Officers having contact with inmates



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## Random Testing

- Limited to positions that are critical to public safety or protection of life, property or national security
- Remember – The burden of proof that a *compelling interest* exists is on the employer

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## Post-Accident Testing

Only when “reasonable suspicion” that the employee involved in the accident was under the influence




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## Reasonable Suspicion Testing

- Less than “probable cause” but more than mere suspicion
- Reasonable belief employee is under the influence – **objective factors**
- May require further investigation based on observations




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## Determining If Reasonable Suspicion Exists



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## What Might Constitute Reasonable Suspicion?



- Alcohol/marijuana smell
- Lapses in performance
- Inability to appropriately respond to questions
- Physical symptoms of alcohol or drug influence



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## The Investigation Process

- Meet with the employee
- Two managers should conduct a reasonable suspicion Investigation
- Each manager should independently determine if reasonable suspicion exists
- Maintain appropriate confidentiality of information (don't gossip!)



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## Analyze All Items Presented

- Give the employee an opportunity to respond
- Is there a reasonable explanation for the employee's behavior or your observations?
- If employee's explanation does not explain your observations and the employee is exhibiting multiple suspect behaviors then you probably will have reasonable suspicion

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## Always Be Thinking

- What would a group of strangers think?
- You could end up in court




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## Before You Can Begin Testing

You must inform your employees about it




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## Elements of a Drug-Free Workplace Policy

- Reason for the policy
- Unacceptable behaviors related to drugs and alcohol
- Employee Reporting Requirements
- Reasons why a test may be required
- What will happen if they fail a test
- What will happen if they refuse to submit to a test
- Rehabilitation Options the Company Offers (Mandatory Rehabilitation Leave)
- Re-employment Opportunities



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## The Drug Free Workplace Program

- When drug testing is required
- Testing procedures
  - Transportation to lab
  - Lab used and location
  - Level of alcohol company considers positive/ THC
- Employee status pending results
- Procedures if a refusal to consent to testing occurs
- Managers role concerning reasonable suspicion testing
- Drug and alcohol forms



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## When a Testing Event Occurs

- Four Step Process



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## - Step One -



Inform the employee that the company is requiring him/her to submit to a drug test under the appropriate reason for testing

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## - Step Two -

- Ask the employee to consent to the drug test in writing
- Explain what will happen if they refuse the drug test
- Explain what the employee's status will be pending the results



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## - Step Three -



Transport or escort employee to testing facility

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## -Step Four-

Assist with arrangements for the employee to be transported and/or escorted home following testing



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## What About These?

Narcotics Identification Test



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## Drug Testing Facilities

- Certified Facilities
- Uses a multi-step process to confirm positives
- Medical Review Officer Review
- Written Confirmation of Positives



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# Remember Confidentiality

- Drug testing documents are confidential records
- Must be maintained in a private file separate from the employee's personnel file.
- Must be retained for same period as you retain employee's medical record




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## CEA is here for you!

- Drug Testing Tool kit
  - Reasonable Suspicion Checklist and More
- Attendance Tool kit
- Workers' Comp Tool kit
- CEA University
  - Online training
  - Forms, policies, articles, employee memos
- Your HR Directors

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# Wrap-Up

- Remember post-employment drug testing requires a compelling reason
- Enforce your policy consistently and without prejudice
- Maintain employee confidentiality




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