



MEMBER ALERT

Marijuana, Alcohol and Prescription Drugs in the Workplace

Effective January 1, 2018, subject to certain limitations, Californians over the age of 21 can purchase and use recreational marijuana, with “medical marijuana” continuing to be available to younger individuals. There may now be 19 million more marijuana users than cigarette smokers, with the number of regular users growing. Studies also suggest that nearly 5% of educational service employees have consumed more than five alcoholic drinks per month during working hours. That same 5% rate applies to employees using illicit drugs, including cocaine, hashish, heroin, and prescription medication used for non-medical purposes. Such actions directly increase safety risks, with an estimated \$42 billion lost each year due to absences, injuries, and lost productivity.

This Member Alert and the upcoming September 28, 2017 seminar will provide Members with:

- Guidance on governing laws that regulate the use and possession of drugs (legal, illegal, and prescription).
- The acceptable circumstances for searching for illegal substances or testing employees for use.
- Available disciplinary options for individuals who violate federal and/or state laws, or Member policies.¹

The Alert and seminar will also reinforce the responsibility of Members to notify employees of the prohibition against drug and alcohol use in the workplace as part of their federal and state funding requirements.

I. MARIJUANA – THE WORKPLACE RULES WILL NOT CHANGE IN 2018

While employees or members of the public may now view marijuana or its derivative cannabinoids as legal, marijuana remains a Class 1 drug under federal law, meaning that its use and possession remain illegal despite more lenient California laws.² Because Members receive federal and state funding, there is a “zero tolerance” drug and alcohol standard in the workplace that will remain in place for marijuana possession or use at Members’ facilities, or at Members’ events, or within 1000 feet of a school site. (E.g., BP 4020; Government Code Section 8355; Health & Safety Code Section 11362.5; 41 USC Section 8103.)

California employers may refuse to employ any person testing positive for drugs in a pre-employment physical, even if the marijuana is used for a “medicinal” reason (*Ross v. Raging Wire Telecommunications, Inc.*, which permitted employer to refuse employment to individual who failed pre-employment drug test arising from use of medical marijuana]). Governing standards also state that employees “shall” face discipline, including possible termination, if they violate these requirements once employed. With “recreational use” soon becoming legal in California, the law will be inconsistent with these governing standards. Members are encouraged to ensure clear messaging to all employees regarding the ongoing “zero tolerance” standards and the consequences of noncompliance.

II. PRESCRIPTION MEDICATION – INCREASING SCRUTINY

Some employees may be engaging in self-medication for various conditions through misuse of their own prescription medications, drugs prescribed to families or friends, or other illegal methods. Other employees may be facing addiction challenges. Still others may be recovering from injuries, where prescribed medications are leading to dependency or abuse. Regardless of the reason, if an employee is using prescription medications in a manner leading to impairment in the workplace, they are in violation of the

¹ This Alert provides an overview of governing principles. Collective bargaining agreements can impose different terms or conditions and should always be reviewed before taking an adverse employment action.

² Pursuant to Health and Safety Code Section 11357(c), it is a misdemeanor for any person over the age of 18 to possess one ounce (28.5 grams) of marijuana, or four grams of concentrated marijuana, whenever classes or school-related programs are taking place. Minors will be charged with an infraction.

governing standards and subject to testing and discipline.³ This is because the conduct prohibited by BP 4020 and the relevant statutes is broader than the use of marijuana or other “illegal drugs.” The prohibited conduct also includes the misuse of any “controlled substance.” A controlled substance, as defined in Education Code Section 44011, includes prescription and controlled medications regulated by the federal Controlled Substances Act (*Health and Safety Code Section 11350.*), such as hydrocodone (Vicodin), oxycodone (Oxycontin), opioids, and codeine.

III. ALCOHOL STANDARDS REMAIN IN PLACE

Members’ public funds cannot be used to purchase alcohol. However, alcohol consumption might still be occurring at lunch/dinner meetings, fund raising events, or while performing other work functions (including at meal or rest breaks). Again, the “zero tolerance” standard equally applies to alcohol, except for specific authorizations allowed by Business and Professions Code Section 25608 (course of instruction and/or after hours special events by third parties under special circumstances).

IV. SEARCHES, TESTING AND CONSEQUENCES

Upon notice that an employee is in violation of the policies, laws, and/or regulations above, through improper possession or use of prohibited drugs, medications, or alcohol, Members must undertake a prompt and reasonable assessment to determine what action, if any, should be taken. This might include a search of District property (District-owned desks, lockers, or other areas where the employee’s privacy might not require more protective enforcement procedures, BP 4119.1); or an objective evaluation of the employee’s eyes, speech, walking patterns, memory/recall, in order to determine if there is a reasonable suspicion of a violation that can result in an immediate right (and likely an obligation) to send the employee for testing. The supervisor, manager, or site or department administrator should promptly consult with Human Resources on proper steps and documentation of the investigation, and Human Resources should direct the employee to a testing center and/or take other steps to confirm or deny the violation. If testing is in order, the employee should be taken to the center by a Member employee since, as a matter of safety given the concern of impairment, he or she should not be allowed to drive a vehicle.

In keeping with standard Board Policies, a violation “shall” result in discipline, including possible termination. The circumstances of the violation might also involve criminal considerations for things like impaired driving, child endangerment, or other aggravating circumstances. If a credentialed employee is involved, there might be an obligation to report the matter to the Commission on Teacher Credentialing, pursuant to Education Code Section 44421, for “unprofessional conduct, or for ... refusal to obey, the laws regulating the duties of persons serving in the public school system.” Notably, the largest category of cases brought before the Commission involves alcohol violations.

V. CONCLUSION

Members are likely to face increasing challenges in the areas of marijuana possession and use given the upcoming change in California’s recreational use laws. Ongoing challenges will continue to exist regarding other drugs, prescription medications, and alcohol, particularly as younger employees present new and different social and professional norms.

This Member Alert provides a relatively high-level overview of key standards for addressing these issues in the workplace. Additional information and examples of best practice standards will be provided to participants of the September 28, 2017 training. For more information, visit: www.nbsia.org/training.

³ There are circumstances in which an employee might be taking prescribed medication properly, and still be “impaired” due to drug sensitivities, mis-dosing, or other circumstances beyond the employee’s immediate control. These employees still have an important duty to self-identify situations in which they might present a risk to themselves or others, or when they cannot complete their job functions safely or appropriately.