TPSA

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Know Your Rights: Drug & Alcohol Policies

As we end another year and decade with festive cheer, it's a good time to examine drug and alcohol policies in the public sector. Drug and alcohol policies are mandatory subjects of bargaining. The Agency must negotiate with your Employee Organization over any new or revised policy prior to implementation. There are also specific, unique rules that offer public employees greater protection than what most private-sector employees have. Here's a brief look at what you should know. Contact staff if you need specific advice.

Public Agencies are "Drug Free" Workplaces: In California, virtually all public employers maintain a drug free workplace. Public agencies must follow the Federal Drug Free Workplace Act of 1988 (41 U.S.C. Ch. 81), which requires employers who enter into certain federal contracts or who receive a federal grant to follow federal drug free workplace regulations. They also must follow state law, Gov't Code § 8350 et seq., which requires employers who contract with or receive grants from the State of California to certify that they provide a drug-free workplace. To comply, agencies adopt drug free workplace policies, which typically define "drugs," identify what conduct is prohibited, and clarify when a drug or alcohol test may be required. There is no employment law in California that protects employees who use illegal drugs. Under virtually any scenario, a public agency may prohibit the use or possession of illegal drugs at work and enforce any violations by the discipline procedure up to and including termination of employment.

Constitutional Rights to Privacy: A public agency's interest in having a drug free workplace is not limitless. The Fourth Amendment ban on unreasonable searches and seizures applies to public agencies acting as an employer. *Skinner v. Railway Labor Executives' Assn*. (1989) 489 U.S. 602, 616-617 (collection and testing of blood and urine constitute a search within the scope of the Fourth Amendment). A public agency cannot

require employees to submit to a "random" drug test unless that employee is subject to Federal Department of Transportation (DOT) regulations or is "safety-sensitive."

But management may drug test employees based on "reasonable suspicion." In this context, "probable cause" is not required prior to testing. Management must have a *reasonable suspicion, based on objective evidence* that the employee is under the influence of a prohibited substance at work. Reasonable suspicion may exist if management notices slurred speech, the smell of alcohol, bizarre conduct, a sudden and precipitous drop in attendance or performance, or other indicators of alcohol or drug use.

Although not a hard standard to satisfy, management still needs to follow a series of steps to confirm that there is a reasonable, particularized suspicion before requiring a drug test that would otherwise invade employee privacy. First, they must thoroughly document their observations of the employee, including reports from any other employees. Second, they ought to meet with the employee to address the situation, including informing him/her of their observations (they don't have to identify co-workers who reported the situation) and provide an opportunity for the employee to explain. The employee has the right to a union representative at this investigatory meeting. If there is concrete tangible evidence that the employee is under the influence of a prohibited substance at work, or the employee admits to being under the influence, management can require a drug test.

If there's not enough evidence, and the employee denies it, management should either return the employee to work or allow for sick leave for the rest of the day if the employee elects to go home. If the employee admits to taking prescription medication as prescribed by his/her treating physician, management may initiate the interactive process to determine if the employee needs a reasonable accommodation (without asking the employee to divulge the medication or the underlying medical condition).

Drug Testing Applicants: Agencies have more latitude in drug testing applicants. The California Supreme Court held that random drug testing is permissible for applicants who received a conditional job offer. *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 883. But a federal appeals court has since held that public employers must establish a "special need" to justify pre-hire drug testing. *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147, 1150-51. This requires evidence of a "specific and substantial" interest not merely a symbolic one (like ensuring a drug-free workplace). Public safety jobs satisfy this test.

Agencies may inquire about current drug use but can't ask about past drug addiction or rehabilitation. They also can't inquire about an applicant's criminal history until making

a conditional offer of employment. (California's Fair Chance Act, Gov't Code § 12952). They can test for alcohol but only after making a conditional offer of employment.

Drug Testing General Employees: There are different rules for drug testing employees in a "safety-sensitive" position or those covered by Federal DOT regulations. For general employees who are not safety-sensitive or non-DOT-covered, as discussed above, management may not randomly test but may conduct reasonable suspicion testing. Management must generally show: (1) a significant and specific work problem traceable to substance use; (2) that testing is a reasonable means to address that problem; and (3) that no less intrusive alternative to testing is available. *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 911. If an employee refuses a lawful test, the refusal itself constitutes insubordination, which may be grounds for discipline up to, and including, termination. *Flowers v. State Personnel Board* (1985) 174 Cal.App.3d 753.

Management may also test general employees after a workplace accident, and when an employee returns to duty after leave for substance abuse. But there are caveats. The Occupational Safety and Health Administration (OSHA) prohibits post-accident testing if the test was conducted to "penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." All employees who could have contributed to the incident should be tested, not just the person who reported it. Although there is no detailed statutory scheme (as with DOT-covered employees) for testing upon return from leave for substance abuse, management can require a test and more than likely will send the employee to a fitness-for-duty exam.

Drug Testing Safety Sensitive & DOT-Covered Employees: Federal DOT regulations require multiple forms of testing for alcohol and drugs including pre-hire testing, random testing, reasonable suspicion testing, post-accident testing, and return-to-duty testing. DOT substances include alcohol, marijuana, cocaine, amphetamines, PCP, and opioids. The regulations are extensive but, broadly speaking, they prohibit employees who are under the influence from reporting to duty, remaining on duty, or performing safety-sensitive functions. Employers who have knowledge that employees are under the influence or have tested positive must prohibit those employees from engaging in safety-sensitive functions. There's a narrow exception for the use of prescription drugs. The drug must be used pursuant to a prescription from a licensed medical professional who: (1) is familiar with the employee's medical history; and (2) has advised them that the substance will not adversely affect their ability to operate a commercial motor vehicle.

DOT pre-hire testing is mandatory for drugs but not for alcohol. DOT reasonable suspicion testing is not materially different than for general employees as discussed above. DOT return to duty testing is mandatory if an employee tests positive for drugs or alcohol following an accident, as part of a random test, or after a reasonable suspicion test. The employee must be cleared by a substance abuse professional, who provides a clinical evaluation and a recommended course of treatment. The professional provides a report to management to confirm the employee completed treatment and/or to recommend further treatment. Management can't return the employee to safety-sensitive functions until cleared by the professional. This includes any follow-up treatment.

DOT post-accident testing is required if the driver receives a citation for a moving violation and the accident resulted in either a bodily injury with immediate medical treatment away from the scene or disabling damage to any motor vehicle requiring a tow away from the scene. It is also required if the accident results in a fatality, regardless of whether the driver receives a citation. Alcohol tests are generally completed within 2 hours and no later than 8 hours after the accident. Drug tests are generally completed within 32 hours.

DOT random testing must be unannounced and spread throughout the calendar year. When selected, the employee must go to the test site immediately or as soon as they complete the safety-sensitive function they are working on. Employees will only be tested for alcohol use while they are performing, just before they perform, or directly after completing a safety-sensitive function.

Management must prohibit DOT-covered employees from performing safety-sensitive functions if they refuse to take the test. As with general employees, management may take disciplinary action for refusal to take any lawful test.

Medical Examinations and Inquiries: Medical examinations involve procedures or tests seeking information about an individual's physical or mental impairments or health, as compared to a drug test which is designed to detect substances. Testing for illegal drugs is not considered a "medical examination" under the federal Americans with Disabilities Act (ADA). But testing for alcohol and legal drugs is. Testing for alcohol may also be considered a medical examination under the California Fair Employment & Housing Act (FEHA). Management must have a reasonable belief that the employee is under the influence of legal drugs or alcohol at work. Medical examinations are allowed when they are "job-related and consistent with business necessity." That means that management must have a reasonable belief based on objective evidence that an employee's ability to

perform essential job functions is impaired by a medical condition (or medications the employee uses for treatment), or that an employee may pose a direct safety threat due to a medical condition and/or treatment associated with the medical condition.

Management must also satisfy this standard to make disability-related inquiries, such as how long a medication's side effects are expected to last or requesting documentation from an employee's health care provider explaining the effects of medication on the employee's ability to perform the job. Disability related inquiries may be appropriate if an employee's performance has declined severely over a short period, the employee has made numerous mistakes, or the employee discloses that their medication makes them lethargic or unable to concentrate. It is not appropriate based on mere gossip, especially if there is no evidence that the employee is unable to safely perform their job duties. But the nature of the work performed is important. For example, if the employee reports being lightheaded, it may matter if the employee is a crane operator responsible for lifting heavy equipment or an office worker performing primarily administrative functions.

Prescription Medication: An employee's use of lawfully prescribed medication is an issue only if there's concrete, tangible and objective evidence that using it prevents the employee from performing the essential job functions or creates a direct threat to the health or safety of others. Even then, management must still engage in an interactive process to determine if a reasonable accommodation can be provided to alleviate the threat or allow the employee to perform the essential job functions.

Prohibiting the use of lawfully prescribed medications that may hypothetically present safety concerns may violate the ADA and the FEHA. To prove that using prescription drugs poses a threat to the health or safety of others, management must establish, based on reasonable medical judgment, that there is a significant risk of the employee causing imminent and substantial harm to themselves or others. Management cannot substitute their judgment in place of a medical determination. The mere potential for poor performance or a threat to safety is not enough to prohibit the use of legally prescribed drugs or to impose reporting requirements or other restrictions.

Marijuana: In November 2016, voters approved Prop 64 (Adult Use of Marijuana Act), which legalized possession and recreational use of small amounts of marijuana. Voters approved the Compassionate Use Act of 1996, which allowed users of medical marijuana to avoid criminal prosecution if they have valid prescriptions. Marijuana is still classified as a controlled substance and is illegal under federal law. Marijuana and other related

products, like CBD oils, are difficult to test for impairment because a detectable amount may remain in an individual's system well after impairment has worn off. Management may have difficulty determining if an employee is under the influence at work unless the employee admits to it or signs of current intoxication are beyond dispute. In any event, public agencies can enforce prohibitions on both the medical and recreational use of marijuana under their drug policies. In *Ross v. RagingWire Telecommunications, Inc*. (2008) 42 Cal.4th 920, the California Supreme Court held that use of marijuana for medicinal purposes is not granted any protected status under the ADA or the FEHA. Prop 64 did not affect this holding. In *RagingWire*, a job applicant argued that the employer violated the FEHA by not accommodating the applicant's off-duty medical marijuana use.

But the law on marijuana is changing rapidly. Arbitrators, civil service commissions, or other hearing officers may be receptive to an employee's pleas for leniency for a positive test for off duty use of marijuana. It's also important whether management is consistent and even-handed in the enforcement of any off-duty marijuana use. Finally, although management may discipline employees for any marijuana use or a positive test, they should not discriminate against the employee for any underlying disability.

Right to Due Process: Management may enforce violations of a drug and alcohol policy under the applicable discipline procedure, which is typically found in the agency's personnel rules or labor contract (MOU). This usually requires "just cause" for disciplinary action. Most permanent public employees in California are entitled to due process under the Constitution before management can impose serious discipline. This requires notice of the proposed discipline, the grounds therefor, all materials upon which it is based, and a pre-disciplinary meeting so the employee can contest the factual basis for, or appropriateness of the severity of the proposed discipline. There the employee can draw attention to mitigating factors (such as it being a first offense), cite their past work history, and ask whether management can really prove he/she was under the influence of prohibited substances at work. Interestingly, in the landmark case where pre-disciplinary rights to due process were announced by the California Supreme Court, the employee was terminated for drinking on his lunch break. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. Once pre-disciplinary due process has been afforded to the employee, management may uphold the proposed discipline. The employee may appeal to a full evidentiary hearing on the merits before a reasonably impartial third party, often an arbitrator, civil service or personnel commission, or the agency's top management.

Employee Assistance Programs & Last Chance Agreements: Employee Assistance Programs (EAPs) help employees deal with personal problems that might adversely impact their job performance, health, and well-being. EAPs provide employees with access to counseling and education services at no cost. Employees who are facing discipline for drug or alcohol use should volunteer to participate in an EAP. An EAP counselor may ask an employee about any physical or mental conditions, provided that the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information revealed by the employee from decision-makers; and (3) has no power to affect employment decisions. The rationale is to allow employees to voluntarily and confidentially seek professional counseling without fear of retribution or retaliation.

Last Chance Agreements (LCAs) provide employees who are facing termination with a final opportunity to remain employed in exchange for an agreement to enter a rehabilitation program, refrain from further use, and/or submit to periodic testing. LCAs are common in situations where an employee has tested positive for being under the influence of prohibited substances at work. The LCA may require the employee to provide periodic status reports or a medical release to contact the rehabilitation facility directly. This is an important exception to the general rule that management may not inquire about the employee's medical treatment or direct that a certain course of treatment be taken. The LCA will typically provide that a single additional occurrence of a policy violation will result in immediate termination with no additional due process, which the employee agrees to waive, except for the ability to contest whether the violation occurred. The employee is free to reject an LCA and its related conditions but may run the risk of the original proposed termination being upheld if he or she does so.

Rehabilitation Programs: Public employers must allow employees to enter rehabilitation programs and cannot discriminate against recovering drug and alcohol users. Both the ADA and the FEHA recognize individuals who are not currently using but are participating or have participated in a supervised rehabilitation program as having a protected disability. The current use of illegal drugs is not a disability under either law. So individuals who are recovering but no longer using alcohol or illegal drugs are protected. These individuals may also request intermittent leave to attend support meetings or medical appointments, or extended leave for longer term treatment. The employee has up to 12 weeks of job protected unpaid leave and may use their sick leave.

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: Governor Newsom signed executive order N-19-19, requiring CalPERS to use their $700 billion investment portfolio to advance California's climate leadership by adopting a proactive investment strategy that reflects the increased risks that climate change poses to the environment and the economy. It includes a timeline and criteria to shift investments to companies and industries that have greater growth potential based on their focus on reducing carbon emissions and adapting to the impacts of climate change, such as investing in carbon-neutral, carbon-negative, climate-resilient, and other clean energy technologies. This could impact PERS' return on investment and possibly even ultimately threaten funds available for PERS retirees. I've heard it referenced lightly in the news but I'm not sure how impactful it is. Should we be concerned? Does the Governor have the power to leverage our retirement system like this?

Answer: This is not something you should be overly concerned about. The executive order puts forth "aspirational" goals but doesn't tell the CalPERS Board specifically how to invest or what to invest in or by how much. In short, the power to manage the investment fund is still vested in the CalPERS Board and this doesn't change that. The Governor does have the power to issue executive orders to suggest investment strategies or targets. More specific parameters must be set through legislation and not an executive order. The idea is to invest in more renewable energies, because stock market returns for renewable energy companies have been doing well and financial analysts predict that they will have higher returns over the next few decades than oil and gas companies. Time will tell whether these strategies are successful. Keep in mind that the fund is still very controlled. The bets placed on private equity or socially responsible investing strategies, for example, are very small relative to the whole amount invested. A large portion of the fund must still be invested in long-term U.S. treasury bonds which historically are a much more stable asset class than growth stocks. So, either way it probably won't impact the solvency or asset and liability sheet by very much, however those bets happen to turn out.

Question: I was on jury duty all week and released back to work with time left in my workday on Thursday. I stayed 2 hours late that night to complete an

assignment that my boss wanted me to finish. The next day was my 9/80 day off but I was asked to come into work for 4 hours to help with a group project that was scheduled overtime. Human Resources is telling me that I don't get overtime pay for either the 2 hours or the 4 hours because of my jury duty service. Is that correct? They say I only worked 6 hours in the workweek, and I must work over 40 hours to be eligible for overtime. What am I entitled to?

Answer: According to the Fair Labor Standards Act (FLSA), overtime must be paid after 40 hours of time "worked." Like sick or vacation time, jury duty is not considered actual time worked for the employer. The good news is that the FLSA is a minimum standard. Your Association could negotiate that jury duty and other paid leave (i.e. vacation, holiday, and bereavement) count as "time worked" for the purpose of calculating overtime. But if your MOU or local rules do not include these provisions, then your current work is paid at straight time wages.

Question: I was a former Records Clerk and I recently accepted a promotion to a Dispatcher for higher pay. I'm now working in Dispatch on a promotional probation. If I don't make the cut as a Dispatcher or I decide it's not for me, do they have to offer me my old job back? I know the Agency wants to float my old position for recruitment by the end of the week, because of understaffing, but I know it can take quite some time to get these positions filled. What should I do? I'm concerned that by the time I decide, or I'm told I don't make the cut, that my old job will be filled.

Answer: The terms of your right to return to the previously held position is typically found in your Agency's Personnel Rules or your MOU. Many, but not all, allow for a return to the prior position if you fail to pass probation, even if the position is filled and even though this may result in an overstaffing or a lay-off. However, it's possible that the rules at your Agency are different.

You generally do not have the right to return to a vacated position voluntarily (that is, even if you're passing probation), but most agencies will work with you if you were good enough to promote, especially if your old position is still vacant. Consult with your professional staff to figure out what the rules are at your Agency and when you can assert your right to return to your old position.

Question: I work adjacent to a front counter where several employees interact with the public. There are two part-time staff who are specifically tasked with helping residents when they come to the counter and one full-time Administrative Assistant who helps as a back-up. There are others that work in that area too, but I'm often asked to

cover for the Administrative Assistant who answers the phones. Today, the counter staff attended a training with their boss and when they got back the Administrative Assistant had not taken a lunch because she had to cover the counter and I was asked to cover the phones for her. I'm concerned that they might ask me to change my schedule to provide lunch coverage for the Administrative Assistant. I'm currently on a 4/10 schedule and I don't know if I'm going to be asked to switch to a different schedule or if I just need to make sure that someone is there to answer phone calls. It's unfair that I am the only one that is asked to cover when there are other people in the Department who can do it. I also don't think it's a productive use of my time. Can they change my schedule or make me cover the phones if it's not in my job description? What can I do about this?

Answer: This is a complicated question that you should navigate with the assistance of your professional staff. Changes to your work hours may be subject to the meet and confer process. But many MOUs include language which allows schedule changes if they are made with some advanced notice to the employee. If the Agency informs you of the need to modify your shift, contact staff immediately to check if you have the right to negotiate or stop it. There are strict timelines to preserve the right to negotiate over the potential change or impact of the change, so don't delay.

The Agency generally has the right to ask you to perform work not specifically listed in your job description. Most job specifications have a catch-all "other duties as assigned" clause for this purpose. If the Administrative Assistant is a higher-paid job class and you are consistently spending a lot of your time performing those duties, you may have an out-of-class grievance. Talk to your staff to find out if this applies to you.

Additionally, the agency does have the management right to designate your position as the position that is responsible to cover the phones in the absence of the Administrative Assistant. But if they are enshrining it in your job description they ought to meet and confer with your Association about it. Also, notify your supervisor in writing if this coverage is impacting your ability to timely complete your regular tasks.

Question: The Agency is not allowing me to go to the DMV on work time to turn in my paperwork to renew my Class A Commercial Driver's License. They will allow me to go to the doctor and undergo the physical exam on work time, but not the DMV. They will allow employees to go to the DMV on work time to initially secure the Class A, but not renew it. Our MOU is silent on this, but there is a past practice of allowing

employees to go to the DMV on work time for renewing the Class A. The Class A is different from a Class C License. Not all positions in Public Works are required to have one. But the Agency still wants some of us to have it and maintain it for work. Is the Agency within its rights to do this? Do I have the right to find out why they made this change? Can I challenge it? In the past, people have mailed in the application, but it goes to a P.O. Box and gets lost sometimes. Then you get a notice in the mail saying your Class A License is being suspended. This never happens when you physically go to the DMV. It seems like the Agency should pay for this.

Answer: If the Agency is seeking to make a change in past practice, the Agency may need to meet and confer with your Association. At that meeting, your representatives can ask why the Agency is making the change. Management does have the right to make the operational change, even if you can establish a past practice. But your representatives should request to formally meet and confer over it and share your input about why this change might be shortsighted.

You may have a grievance over the denied time off to go to the DMV to process the renewal, depending on how "clearly established" the past practice of giving time for this purpose is. It's not easy to establish an enforceable past practice, and there are time limits involved, so contact your professional staff immediately. A grievance isn't always an instant solution, so if you need to renew your license soon you may need to ask for vacation for that purpose until you complete the grievance procedure and get restitution of the vacation leave.