Rule Changes Ahead for 2017

Marijuana: Workplace Drug-Free Policy Update

California Proposition 64 — Adult Use of Marijuana

In the November 2016 election, California voters passed Proposition 64 to legalize adult recreational use of marijuana by a wide margin of 56% to 44%. This initiative was backed by Lieutenant Governor Gavin Newsom and received substantial financial support from former Facebook President Sean Parker. The initiative includes language to allow employers to continue to maintain drug-free workplaces and continue to, or implement drug testing as allowed under the law currently. The workplace language in the initiative mirrors the language adopted by the Legislature in 2015 to regulate the medical marijuana market.

National Marijuana Ballot Initiatives

Marijuana ballot measures across the country won in eight out of nine races in 2016. Arkansas, Florida, Montana and North Dakota passed new laws allowing or expanding medical use of marijuana. In addition to California passing adult recreational use, Maine, Massachusetts and Nevada also will allow adult use. All of the new laws—medical or recreational use—include provisions to allow employers to maintain drug-free workplaces, and do not require employers to accommodate marijuana use in the workplace. A ballot measure to legalize adult recreational use in Arizona did not pass.

Accommodating Marijuana Use by Employees

Under current law, employers can terminate employees or refuse a job to applicants for testing positive for marijuana where employers maintain drug-free workplace policies. While state laws vary, most states—including California—do not require employers to accommodate medical marijuana use by their employees. Courts in California, Montana, Washington, New Mexico and Massachusetts have considered the issue and continue to rule on the side of employers. However, expanding legalization of medical and adult recreational use of marijuana is sparking new conflicts and uncertainty between employers trying to maintain drug-free workplaces and workers who say they're being punished for their legal use of marijuana.

At least for now, California employers should remain confident that they can continue to enforce drug-free workplace policies, even though marijuana is legal for recreational and medical use.

Provisions in Law to Protect Employers

Both California medical and recreational marijuana laws include this provision in regards to the workplace:

"... shall not interfere with an employer's rights and obligations 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 cannabis in the workplace or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law."

The trend toward legalization of marijuana at the state level around the country is well underway, and may well challenge current workplace rules in the long term. The reality of off-duty legal use could have an impact on the workplace in new and different ways than currently exist and could challenge the right of employers to prohibit employee use of marijuana. The fact remains that marijuana use is illegal under federal law, which creates complexities where it is legal under state law.

Although the U.S. Department of Justice has stated its intent not to pursue federal prosecutions in states with laws that permit marijuana use, it is a risk to states that the federal guidance can be withdrawn or revised and federal enforcement could occur. Employers should stay abreast of changes to federal and state law through legislation, regulation, administrative directive and court decisions governing marijuana use and the potential impact on such risk management areas as workers' compensation, unemployment insurance, workplace safety and liability.

Evolving Science of Drug Testing

Currently, testing for marijuana determines whether someone has the substance in their system—regardless of when the substance was actually consumed. There currently is no set standard on how much marijuana can be in someone's system before he/she is deemed legally intoxicated under the law as there is for alcohol. One of the challenges is that marijuana can remain in the body long after any intoxicating effects of the drug have worn off, sometimes weeks after use. In contrast, a simple breath test can determine if someone has reached the legal limit for alcohol in his/her system and thus is impaired based on the legal limit set by the law.

At this time, reports confirm several companies are close to creating a device much like a breathalyzer that will identify the recent consumption of marijuana—either smoked or eaten.

One company in particular is very close to creating such a device. Hound Labs, Inc., based in Oakland, has been field testing its marijuana breathalyzer, becoming the first to be tested by law enforcement. The company reports that the device can detect and measure recent consumption of THC (the active ingredient in cannabis) in both smoked and edible marijuana products. Hounds Labs expects its product to be available to law enforcement in 2017. The device is reported to measure THC breath levels for about two hours after smoking, which aligns with the window of impairment generally associated with smoking marijuana. For edibles, the detection window is longer because edibles stay in breath longer. This type of technology will enable continued research to potentially determine levels of THC in breath that correlate to impairment, just as there is for alcohol breathalyzers.

For further background information, see the CalChamber 2016 Business Issues article "Marijuana: Legalizing Medical, Recreational Uses Has Implications for Workplace Drug Use Policies."

CalChamber

Expanding Opportunity
An Agenda for All Californians

2017 Business Issues and Legislative Guide

See the entire CalChamber 2017 Business Issues and Legislative Guide at
www.calchamber.com/businessissues
Free PDF or epub available to download.

Special Thanks to the Sponsors
Of the 2017 Business Issues and Legislative Guide

Premier

Chevron

Bronze

enterprise

Iron

AUTOMOBILE CLUB • SOUTHERN CALIFORNIA • AAA
We're always with you.®

COMCAST BUSINESS
B4B
BUILT FOR BUSINESS™

Post-Accident Drug Testing

Many employers maintain post-accident drug and alcohol testing policies to promote workplace safety, as part of accident investigation efforts and in the hope of reducing workplace accidents and workers' compensation claims. In California, post-accident drug testing is legal. For those employers, the legal landscape may have shifted on May 12, 2016, when the Occupational Safety and Health Administration (Federal OSHA) published its final rule on electronic reporting of workplace injuries and illnesses.

The new rule enhances an employer's obligation to ensure that employees report work-related injuries and illnesses. Specifically, effective August 10, 2016, employers must establish "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately. The rule prohibits this procedure from deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness. The rule also prohibits any retaliation for reporting an injury or illness. Under this new reporting standard, employer policies that request or require post-accident drug or alcohol testing now will face scrutiny by Federal OSHA because, the agency claims, post-accident testing potentially deters injury reporting. Cal/OSHA has six months to adopt the federal policies, and is reported to be working on an implementation policy and approach. The new Federal OSHA rule is discussed in more detail below, under "California's Adoption of Federal OSHA Rules."

Heat Illness Prevention

In 1998, California adopted rules to create an Injury and Illness Prevention Program (IIPP) required by all employers to create a roadmap of how each employer will address its unique workplace hazards and to minimize those hazards. In subsequent years, the safety culture has evolved to adapt to the IIPP requirements and increase workplace safety throughout the state. Furthermore, Cal/OSHA has developed a number of model IIPP programs for employers in various industries to assist them in developing their own IIPP.

In 2005, California became the first state—and still the only state in the nation—to pass a heat illness prevention standard to protect outdoor workers (California Code of Regulations. Title 8, Section 3395). The heat illness prevention standard requires employers to provide agricultural workers, construction workers, landscapers, and others who work outdoors with water, shade, rest breaks, and training. Known as the high heat provisions, additional requirements apply when the outdoor temperature exceeds 95 degrees.

In 2016, the California Legislature passed, and the Governor signed SB 1167 (Mendoza; D-Artesia; Chapter 839) to require Cal/OSHA to propose by January 1, 2019 to the Occupational Safety and Health Standards Board for the board's review and adoption, a heat injury and illness prevention standard applicable to workers for indoor places of employment.

The California Chamber of Commerce and a large coalition of businesses opposed the legislation as unnecessary because current regulations (Title 8, Section 3203 Injury and Illness Prevention Program) require employers to identify and address workplace hazards, including the risk of heat illness in indoor workplaces. Now that SB 1167 is law, the CalChamber will work with affected stakeholders to find consensus for a reasonable and rational regulation.

2017 Stakeholder Meetings –Heat Illness Prevention for Indoor Workers

In 2017, Cal/OSHA will convene stakeholder groups—called advisory committees—to attempt the challenge of reaching consensus amongst stakeholders from industry, labor, management and academia on how to regulate the prevention of heat illness for indoor workers. Two major factors that will undoubtedly present the most challenge are defining what is indoors—as opposed to outdoors (some workers go in and out, or work in areas that are merely covered but not indoor in the traditional sense), and what will be the scope of the regulation, that is, which industries or types of workplaces are most at risk of exposing workers to heat illness and would be most appropriately regulated, and will the regulation be limited to those workplaces.

These questions of scope will require industry input in order to provide information regarding the most rational and complete understanding of operations and risks, as well as rational, feasible policies to address those identified risks.

It is anticipated that many industries will be represented in the stakeholder discussions, from warehouses to restaurants to laundry operations, and many others. The CalChamber would argue that the scope be limited to workplaces that expose employees to heat that have the reasonable potential to put employees at risk of heat illness. SB 1167 does not specify any exceptions, including air conditioned offices. It will be at the discretion and under the authority of Cal/OSHA to determine the scope of the regulation, and identify those exceptions, from stakeholder input.

To participate in CalChamber's stakeholder working group, please send an email of interest with contact information to *heatillness@calchamber.com*.

Workplace Violence Prevention

In 2014, two health care worker unions filed a petition asking the Cal/OSHA Standards Board to adopt a regulation to provide health care workers with specific protections against workplace violence. Later that same year, the Governor signed SB 1299, consistent with the previous petitions, to require the board to adopt regulations to protect hospital workers from workplace violence. Over the following two years, an advisory committee of stakeholders considered regulatory language. The first-in-the-nation rule to protect health care workers against workplace violence was adopted by the Cal/OSHA Standards Board in October 2016, and it is anticipated that the final rule will be effective in April 2017.

In 2017, Cal/OSHA will begin work on a workplace violence prevention standard for general industry. It is anticipated that the health care worker standard will provide a conceptual starting point for the subsequent general industry rule. Look for Cal/OSHA to convene advisory committees beginning January 2017, which is the first step in the rulemaking process. CalChamber will be engaged in the process, and will be inviting members and partners to join our coalition.

Hotel Housekeeping Musculoskeletal Injury Prevention Program

In 2012, UNITE HERE, a labor union representing workers in the hotel, gaming, food service, airport, textile, manufacturing, distribution, laundry and transportation industries, petitioned the Cal/OSHA Standards Board to develop a safety and health standard to "address the occupational hazards faced by housekeepers in the hotel and hospitality industry." Advocates are calling for stronger protections and better ergonomics training for hotel housekeeping workers to wrestle heavy mattresses and increased hotel room amenities, such as heavier comforters and towels.

Following the petition, Cal/OSHA convened a number of advisory committees, bringing UNITE HERE workers and advocates along with industry representatives, including CalChamber and the California Hotel and Lodging Association, to the table to discuss possible regulatory approaches and language. A final draft of the proposed regulation was issued in December 2016, and it is anticipated that formal rulemaking will proceed in 2017.

CalChamber, alongside our partners representing the hotel industry, was actively involved in the advisory committees and in the drafting process. Our coalition continued to disagree with the proposed approach to address workplace hazards in lodging establishments for housekeepers. Current law requires all places of employment—including hotels and lodging establishments—to have an Injury and Illness Prevention Program (IIPP), as well as to comply with the requirements of a repetitive motion injury program where warranted.

Although Cal/OSHA did adopt a number of employers' recommended revisions to the language, employers maintain that a separate stand-alone program specifically for preventing ergonomic injuries (also known as musculoskeletal injuries, or MSDs) exclusively for housekeepers is unwarranted. The draft regulation is overly prescriptive, departs from the plain language and intent of the IIPP model and assumes that housekeeping is hazardous and must be corrected. The coalition will continue to work with Cal/OSHA and encourage further revision to the language.

Formal rulemaking will begin with a public hearing at which members of the public may submit written comment, or oral testimony to the Cal/OSHA Standards Board. Following Cal/OSHA's review of comments, revisions may be made to the language, and then resubmitted to the public for further comment. Updates, announcements and more information about the proposal can be found on Cal/OSHA's website, at *www.dir.ca.gov/dosh/DoshReg/Hotel_Housekeeping.html*.

Permissible Exposure Levels (PEL)

One of Cal/OSHA's responsibilities is to set permissible exposure levels (PEL) for various substances that employees are exposed to through the workplace and their job duties. Over the years, PELs have been developed through a participatory stakeholder advisory process similar to other rulemaking, but different in that each substance had been evaluated by two committees—one on the health effects and one on feasibility of implementation.

After a 4½ year hiatus, largely due to staff depletion, Cal/OSHA is resuming the advisory process for PEL development in 2017 under a new set of policies and procedures. The Health Experts Advisory Committee (HEAC) has established new PEL developments such as committee policy and procedures, committee members, and chemical priorities for PEL setting.

Led by Cal/OSHA staff, the past PEL-setting process relied on volunteers to develop the initial rationale for proposed PELs. As such, Cal/OSHA had repeatedly expressed intent to revise the policy and procedures to rely less on volunteers and more on staff, whether in Cal/OSHA or other public health agencies. The resumption of the PEL process is linked to the recent hiring of a toxicologist—a long-vacant position—who would be capable of developing the initial rationale and submitting it to the advisory committees for review and comment only. Furthermore, it is expected that Cal/OSHA will release a revised list of priorities in 2017 identifying the chemicals for which PELs will be set.

It is expected that the Feasibility Advisory Committee (FAC) will convene thereafter in 2017.

More will be known about the chemicals to be moved through the committee process in 2017 once the priorities list has been released and finalized. The only certainties are three legacy chemicals (n-propanol, cyclohexane, and trimellitic anhydride) that had completed the HEAC committee process but not the FAC before the committee process was shut down in 2012. Of note, another three chemicals completed the committee process in 2012 and are nearly ready for formal rulemaking by the Cal/OSHA Standards Board, which may or may not occur in 2017. Those three are trichloroethylene, benzyl chloride, and tetrabromoethane.

California's Adoption of Federal OSHA Rules

States with occupational safety and health plans, such as California, must maintain safety rules at least as effective as the federal plan, and in some instances, the same as the federal rules. In many cases, California's rules are already more stringent, or more effective than the federal rules.

Following are a few of the most significant rule changes facing Cal/OSHA in 2017, both ongoing and new.

Penalty Adjustment

In November 2015, Congress enacted legislation requiring federal agencies to adjust their civil penalties to account for inflation. The U.S. Department of Labor has adjusted penalties for its agencies, including the Federal Occupational Safety and Health Administration (Federal OSHA). Federal OSHA penalties have not increased since 1990. The new federal OSHA penalties took effect August 2, 2016, increasing the top penalty for serious violations from $7,000 to $12,471, still far below the highest Cal/OSHA penalties for similar violations.

Cal/OSHA's highest penalty for serious-willful violations is $70,000. Serious violations can cost employers as much as $25,000, although $18,000 is commonly proposed, according to the *Cal-OSHA Reporter*. Cal/OSHA's penalty structure for serious violations was last increased in 2000 under AB 1127.

Cal/OSHA Penalty Structure

Type of Violation	Current Maximum Penalty	New Maximum Penalty
Serious Other-Than-Serious Posting Requirements	$7,000 per violation	$12,471 per violation
Failure to Abate	$7,000 per day beyond the abatement date	$12,471 per day beyond the abatement date
Willful or Repeated	$70,000 per violation	$124,709 per violation

State plan states, such as California, are required to adopt maximum penalty levels that are at least as effective as Federal OSHA's. Cal/OSHA will likely increase its penalty levels in 2017 by the same percentage as the Federal OSHA increase. These changes must be made through legislative action because current penalty levels for Cal/OSHA citations are in the California Labor Code. Changes to the Labor Code require statutory change through legislation and cannot be revised by regulation.

Recordkeeping and Injury Reporting

One of the goals of the new federal OSHA recordkeeping rule is to improve the completeness and accuracy of injury and illness data collected by employers and reported to OSHA. When workers are discouraged from reporting occupational injuries and illnesses, the information gathered and reported is potentially incomplete and inaccurate.

The rule includes three provisions that are intended to address this issue:

- An employer's procedure for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting;
- Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation; and
- An employer may not retaliate against employees for reporting work-related injuries or illnesses.

Furthermore, as discussed in the section of this article "Marijuana: Workplace Drug-Free Policy Update," Federal OSHA has indicated that post-accident drug testing, as a matter of policy, could be considered retaliation and could discourage reporting of workplace injuries.

In response to employer concerns, Federal OSHA issued a memo to clarify the rules for post-accident drug testing to allow it under some circumstances, and prohibit it as a form of discipline. According to Federal OSHA, the rule does not ban appropriate disciplinary, incentive or drug-testing programs. However, it allows OSHA to issue citations for retaliatory actions against workers when these programs are used to discourage workers from exercising their right to report workplace injuries and illnesses.

According to Federal OSHA, OSHA State Plan states must adopt requirements that are substantially identical to the requirements in this final rule. It is anticipated that Cal/OSHA will initiate formal rulemaking to conform to the new federal rules in 2017.

Staff Contact
Marti Fisher
Policy Advocate

marti.fisher@calchamber.com
California Chamber of Commerce
P.O. Box 1736
Sacramento, CA 95812-1736
(916) 444-6670
www.calchamber.com
January 2017