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Drugs and Alcohol

Applicants or employees who currently use illegal drugs, marijuana or abuse alcohol are not protected under the ADA or FEHA.

Proposition 64 legalized the use of recreational marijuana, however, employers may continue to prohibit marijuana in the workplace. For more information, see [Adult Use of Marijuana Act](#).

You can terminate, discipline or refuse to hire any individual who currently uses controlled substances or who is addicted to them. You can do so regardless of whether the use has any effect on job performance. Taking any of these actions does not violate the discrimination provisions of the ADA or FEHA. You can have employment policies prohibiting the use of drugs, marijuana and alcohol without violating the ADA or FEHA. See "Drug-Free Workplace Policy Guidelines" in [Drug- and Alcohol-Free Workplace Policies](#).

Under the ADA or FEHA, a test to determine if an employee is using illegal drugs or abusing alcohol is not considered a medical examination. You can conduct drug tests that are designed to accurately identify illegal drugs even before a job offer is made. For more information, see [When Drug Testing May be Permitted](#).

However, the ADA and FEHA protect individuals who have successfully completed a supervised drug or alcohol rehabilitation program and no longer use illegal drugs or abuse alcohol. They also protect individuals who are erroneously regarded as using illegal drugs or abusing alcohol.

Additionally, illegal use of drugs or marijuana does not include the use of drugs taken under the supervision of a licensed health care professional. To ensure that this requirement is met, give the employee an opportunity to discuss and explain test results.

Adopting and administering reasonable policies to prevent drug use, possession, or sale in the workplace does not violate the ADA or FEHA.

Protection for Recovered Drug and Alcohol Abusers

While current users are not protected, recovered drug and alcohol abusers may be covered under certain circumstances. The ADA and FEHA protect people who meet all of the following criteria:

- Formerly abused alcohol or illegal drugs
- Successfully rehabilitated themselves, either through a supervised rehabilitation program or through their own program
- No longer use illegal drugs

This protection extends to individuals participating in a drug or alcohol rehabilitation program.

Past illegal drug use may warrant exclusion from employment in specific occupations, such as police officers, or where the employer can demonstrate a direct threat to the health and safety of the individual or others. Any decision to take action based on prior illegal drug use should only be made after consulting an attorney.



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Questions about past addiction to illegal drugs or participation in a rehabilitation program are considered “disability-related inquiries.” An employer may only make disability-related inquiries if they are job-related and consistent with business necessity.

Although individuals with a record of drug use who have successfully completed a rehabilitation program and no longer use illegal drugs may be protected, unacceptable addiction-related misconduct that violates company policy or performance standards is not protected under the ADA.

In *Hernandez v. Hughes Missile Systems*, the Ninth Circuit Court of Appeals decided that a blanket refusal to rehire any employee terminated for violating company policy violated the ADA. The court stated that the blanket refusal would exclude a former employee who had recovered from drug and alcohol dependencies.

However, the U.S. Supreme Court reversed the Ninth Circuit Court of Appeals decision. The U.S. Supreme Court focused on the important difference between two legal theories — “disparate treatment” and “disparate impact.” Hernandez’s lawsuit relied on both.

In arguing disparate *treatment*, the employee claimed the company treated him less favorably than other applicants because of his real or perceived disability.

In arguing disparate *impact*, the issue was whether the rule against rehiring previously discharged employees discriminates against the protected class of recovered substance abusers in a way not justified by business necessity.

The disparate treatment claim was rejected because the no-rehire rule had a legitimate non-discriminatory basis. It is legitimate for a business to refuse to rehire an employee terminated for violating workplace conduct rules. However, the U.S. Supreme Court sent the case back to the Ninth Circuit Court of Appeals to determine if a “disparate impact” existed. Upon remand, the Ninth Circuit Court of Appeals reversed the trial court’s decision, finding there was a material fact as to whether the decision not to re-hire Hernandez was based on his status as a substance abuser rather than a policy that prohibited rehiring violators of workplace conduct rules.

In *Lopez v. Pacific Maritime Association*, the Ninth Circuit ruled that employers can have a “one-strike” rule that permanently disqualifies an applicant from future employment who fails a drug test, even once.⁵ The court held that such a rule does not violate the ADA or state law prohibitions against disability discrimination. The applicant failed the company’s drug test that is mandatory for all job seekers. The company had a one-strike rule — fail the test and you can never work at the company. After being rejected for employment, the applicant entered a rehabilitation program and then reapplied while still in the rehab program. The company rejected the applicant citing the one-strike rule. The court upheld the employer’s decision because the one-strike rule eliminated all candidates who tested positive and there was no evidence of a disparate impact — that the rule disproportionately screened out recovering drug addicts.

Questions about an employee or applicant’s past use of illegal drugs or participation in a rehabilitation program are disability-related inquiries.

Employers that want to adopt drug testing policies that eliminate and permanently ban candidates who fail pre-employment drug screening are advised to ensure that these policies are drafted in consultation with legal counsel and consistently enforced.



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Recent Drug and Alcohol Abuse Not Protected by the ADA

The ADA does not protect employees who are participating in drug or alcohol rehabilitation programs unless they successfully refrain from drug or alcohol use for a significant period of time.

In *Brown v. Lucky Stores, Inc.*, Karen Brown, a checker at a Lucky grocery store in California, was arrested and jailed for driving under the influence of alcohol and methamphetamine. Brown missed the next two days of work while in jail and the following day while attending a court-ordered drug and alcohol rehabilitation program. Lucky terminated Brown for job abandonment.

Brown argued that the ADA protects an employee who participates in a supervised rehabilitation program and no longer uses alcohol or illegal drugs. She claimed that after she entered the rehabilitation program, she no longer used alcohol or drugs and Lucky should have accommodated her by providing a leave of absence.

The Ninth Circuit Court of Appeals rejected Brown's argument, citing a congressional report that was prepared when the ADA passed, which stated, "employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem."

Medical Marijuana Use Not Protected by the ADA or FEHA

You have the right to enforce a drug-free policy in your workforce, even though medical marijuana use is permitted under state law. The same is true with the recreational use of marijuana, which was recently legalized in California with the passage of Proposition 64.

- Proposition 64 legalized the use of recreational marijuana for adults over the age of 21, however, employers may continue to prohibit marijuana in the workplace. For more information, see [Adult Use of Marijuana Act](#).

In *Ross v. Ragingwire Telecommunications, Inc.*, an employer received the results of an employment drug test and, after eight days of employment, discharged an employee for marijuana use. The employee sued for wrongful termination, employment discrimination and breach of contract. He alleged that he was permitted to use marijuana under his physician's prescription for chronic back pain, pursuant to the California Compassionate Use Act of 1996.

Because of his condition, Ross was considered a qualified individual with a disability under FEHA. After RagingWire Telecommunications, Inc., offered Ross a job as a lead systems administrator, it required him to take a drug test as a condition of employment. Ross tested positive for marijuana. RagingWire reviewed Ross's documentation about his prescription marijuana use but fired him because he failed the drug test.

Ross claimed his disability and use of marijuana to treat pain does not affect his ability to perform the essential functions of the job for which he was hired. Thus, Ross claimed that RagingWire violated FEHA because the company failed to make a reasonable accommodation for his disability. Ross was essentially asking RagingWire to accommodate his marijuana use at home by waiving its policy requiring a negative drug test of new employees. Ross claimed that his marijuana use is akin to the use of insulin or other prescription medications that are legal under California law. RagingWire



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countered that it terminated Ross based on its policy to deny employment to people who test positive for illegal drugs.

The California Supreme Court upheld the termination. According to the court, the Compassionate Use Act did not give marijuana the same legal status of other legal prescription drugs because marijuana is still an illegal drug under federal law. Further, the Act only specifies that users of marijuana under the Act are only exempted from criminal liability. Indeed, FEHA does not require employers to accommodate the use of illegal drugs nor does the Act address the issue as it impacts California employers. If the Legislature intended the Act to impact employer rights, legislators would have stated this in the law. The Legislature has not.

- Proposition 64, which legalized adult recreational use of marijuana, does not prohibit employers from continuing to test for marijuana use. For more information, see [Adult Use of Marijuana Act](#).

In *James v. City of Costa Mesa*, a case involving medical marijuana and the ADA, the Ninth Circuit Court of Appeals reached a similar conclusion.

The ADA excludes individuals who are currently using illegal drugs from the definition of “disability.” In *James*, the Ninth Circuit ruled that the definition of “illegality” is linked to federal, not state law. Though state law exempts users of prescription medical marijuana from criminal prosecutions, federal law classifies any marijuana use as “illegal” under the federal Controlled Substances Act.

The Ninth Circuit ruled that because federal law does not authorize marijuana use, current users are not entitled to the protection from discrimination under the ADA.

The case involved Title II of the ADA, which prohibits discrimination against the disabled in the provision of public services. The lawsuit alleged that attempts by two cities to interfere with access to medical marijuana facilities violated Title II of the ADA.

Though the case does not involve the employment discrimination provisions found in Title I of the ADA, the definition of disability is the same in both Title I and Title II of the ADA. Thus, the *James* ruling would also likely apply to employment discrimination cases.

Drug Use at Work Not Protected by the ADA

Terminating an employee for engaging in the illegal use of drugs at work does not violate the ADA. In *Collings v. Longview Fibre Co.*, the Ninth Circuit Court of Appeals held that such a discharge is based on the employee’s misconduct rather than any disability, such as drug addiction, that would otherwise be protected under the ADA.

The Ninth Circuit Court of Appeals case clarifies that the ADA does not protect individuals who are currently using illegal drugs. You can terminate or deny employment to people who use drugs illegally. However, employees who have been rehabilitated successfully are protected under the ADA. Thoroughly investigate any suspected illegal use of drugs before terminating those involved. An individual who was terminated after erroneously being perceived as a drug addict is likely to have a valid claim under the ADA and FEHA. Performance of a good-faith investigation may serve in your defense.