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Drug- and Alcohol-Free Workplace Policies

You may have an employment policy that prohibits employees from being under the influence of drugs, marijuana or alcohol while in the workplace without violating the ADA or FEHA. For more information, see ["Drugs and Alcohol."](#) You may implement and enforce a drug and alcohol-free workplace policy, even if you are not required to have one under the federal and state drug free workplace acts.

Proposition 64 legalized recreational use of marijuana in California, however, employers may continue to maintain workplace policies prohibiting marijuana. Employers should clearly state their position on the use of marijuana in the workplace.

Drug- and Alcohol-Free Workplace Policy Guidelines

A drug-and alcohol-free workplace policy communicates your concern about the use of drugs, marijuana and alcohol in the workplace and notifies employees that you prohibit their use during the workday or while on Company property. Additionally, such a policy informs employees of your rules and regulations concerning drugs, marijuana and alcohol as well as the consequences of failing to comply with them.

- Consult with legal counsel before implementing any alcohol-or drug-free workplace policy.

When drafting a policy, consider a ban on the use, possession or sale of illegal drugs, marijuana and alcohol in the workplace and on company property. The policy should assert that drug use is extremely harmful to employees' health, interferes with productivity and alertness and that an employee under the influence of drugs is a danger to himself/herself and to fellow employees.

In addition, include the consequences for violating the policy, and establish a disciplinary policy for those found using, possessing or selling drugs on company premises. Discipline can range from a warning to immediate termination of employment. Emphasize a counseling and/or a rehabilitation program. Any court that hears an employee challenge to an employer's drug-free workplace policy will look favorably on this emphasis.

Finally, train all supervisors about your drug-free workplace policy, how to identify signs of drug or alcohol abuse, including use of marijuana and clearly communicate your policy to all employees.

- Due to the passage of Proposition 64, it is a good idea to remind employees about your drug- and alcohol-free workplace policies, emphasizing the fact that those policies include marijuana, which remains prohibited in the workplace.

Drug Testing as Part of Policy

If you decide to make drug testing part of your drug-free workplace policy, consult with legal counsel. You must decide:



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- Which jobs require drug testing? Consider jobs that involve employee safety, public safety, or company or national security. Remember that a drug testing requirement must always be closely job-related.
- When do you test an employee? Before employment? On reasonable suspicion? Only in certain workplaces?
- What are the costs of drug testing? Drug testing should be conducted only by a licensed laboratory acting under U.S. Department of Health and Human Services guidelines.
- What penalties should the employee expect if tests are positive? What procedures, if any, should be followed after a drug violation is determined?
- If you have adopted a rehabilitation policy, at what point should you require the employee to enroll in it?
- What is the company policy if an employee refuses to be tested or to enter a rehabilitation program?

The security and safety of employees, property and the company's clientele are your primary goals. Remember, there must be a connection between any job you designate as requiring drug testing and a legitimate business need.

- You must retain drug testing records in a private file separate from the employee's personnel file for at least as long as you would retain any other medical record.

Alcohol at Workplace Functions

Many employers choose to serve alcohol at workplace functions, such as annual office holiday parties.

Employers should be mindful of what their workplace policies say about using alcohol on the job and whether those policies extend to off-the-job company events. Moreover, employers should exercise caution before serving alcohol at company functions. Employers can be liable for an employee's drunk-driving accident — even if the accident occurs after the work function is over. In one case, an employee, Michael Landri, made it home safely from an office holiday party but went out later that night and drove his vehicle while still intoxicated from the party. Unfortunately, the employee killed another driver in a high-speed crash. The court found that the employer, a Marriot hotel, could be held liable.¹

In December 2009, Marriott Del Mar Hotel (Marriott) held its annual holiday party for employees and management as a "thank you" for their work. The party was held at the hotel. Marriott planned to serve only beer and wine and to provide two drink tickets to party attendees. Attendance at the party was voluntary.

Even though only beer and wine were supposed to be served at the party, the general manager for the restaurant was bartending the party and had a bottle of whiskey brought to the bar from the hotel's liquor supply. The general manager filled Landri's flask with whiskey on at least one occasion (maybe more), shared shots with him, and also served whiskey to other guests.

This manager also shared another bottle of hard alcohol with guests. She testified that "historically there has been a lot of drinking and not a lot of control at these types of [employee] parties."

In addition, the assistant general manager of the hotel (the second-highest-ranking hotel employee) saw Landri using the flask and shared shots of alcohol with him and another employee.



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Landri left the party with some co-workers, and did not drink any more after leaving the hotel party. After being home for about 20 minutes, Landri decided to drive a drunk co-worker home. While doing so, he rear-ended a car at more than 100 miles per hour, killing the driver of the other car.

The parents of the deceased driver sued Landri and Marriott for wrongful death. Marriott argued that it could not be liable because Landri was engaged in purely personal conduct when he left home after first arriving there safely and, according to Marriott, Landri's travel was unrelated to work.

The court disagreed because the consumption of alcohol that eventually led to the accident was employment related, and the intoxication itself occurred during the scope of the employment. The court ruled that an employer can be liable if the activities that caused the employee to harm others were either:

- Undertaken with the employer's permission and were of some benefit to the employer; or
- A customary incident of employment.

The court stated that Marriott received at least a tangential "benefit" from the holiday party and the drinking of alcohol. The party was intended as a form of employee appreciation and was meant to improve employee morale and further employer/employee relations.

The drinking of alcohol was also a customary incident of employment. The employees had permission to drink and Marriott did not follow its own rules relating to serving only beer and wine and permitted the consumption of hard alcohol. Employees finished alcohol leftover from parties, tasted new drinks and could have drinks purchased for them, and management never said anything about it.

According to the court, Marriott could not "ignore the fact that it created the risk of harm at its party by allowing an employee to consume alcohol to the point of intoxication." Liability, according to the court, continues until the risk that was created within the scope of employment "dissipates." In other words, in the case of alcohol consumption related to work, the employer is potentially on the hook until the employee sobers up.

- Employers should consider whether they should serve alcohol at company functions given the risk of liability. If alcohol is served, several measures should be in place to lessen the risk, such as enforcing a drink ticket policy, serving drinks for only a limited time, offering transportation, and monitoring the situation.

As the court noted, the only way to completely eliminate the risk of harm to others and the risk of potential liability, is to forbid alcohol at company functions entirely.