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Mental Health and Substance Abuse in the Legal Profession and Workplace

ACC San Diego MCLE

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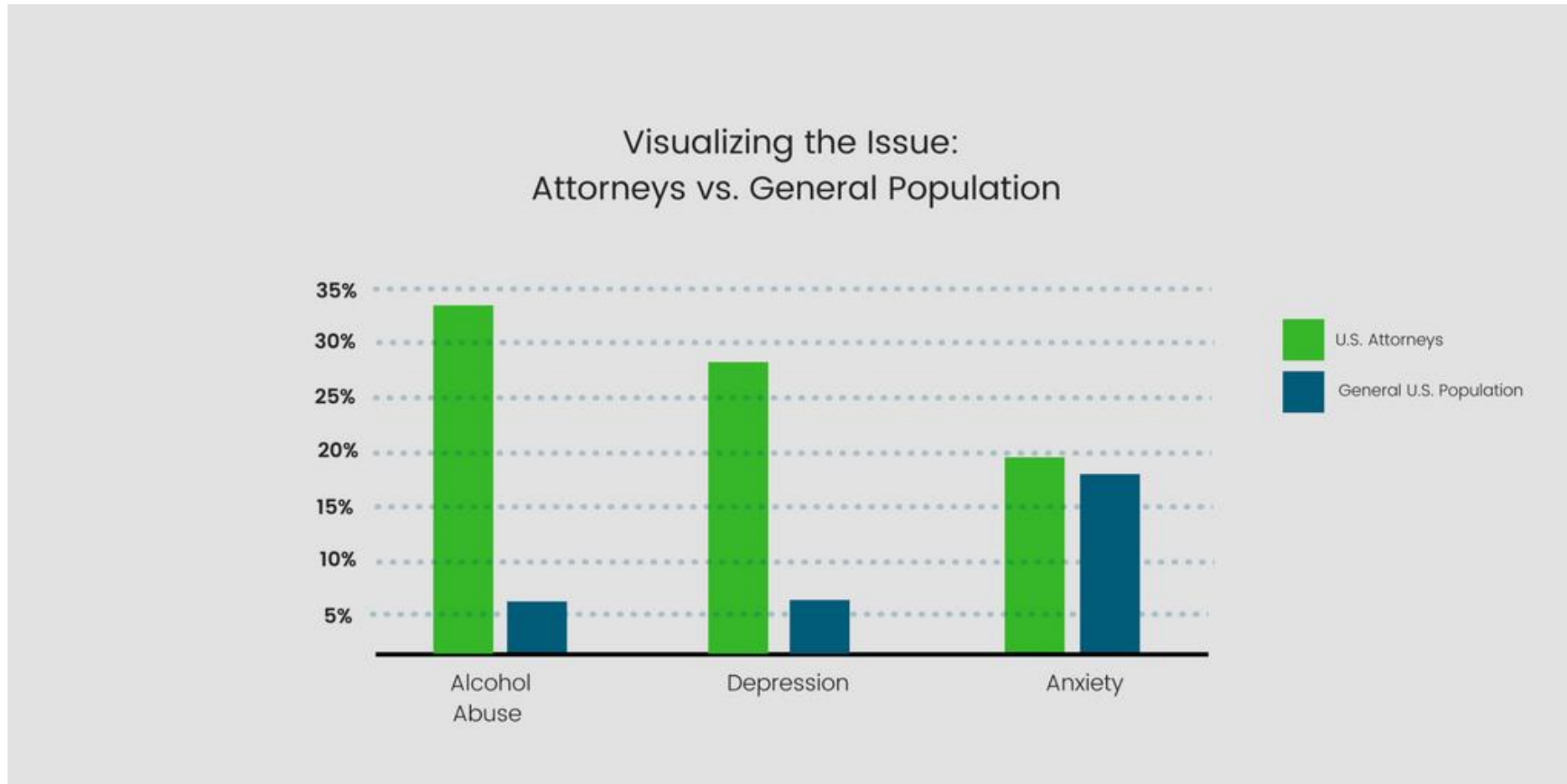
- Current state of substance use and mental health concerns of U.S. attorneys
- Mental health and substance abuse in the workplace
- Marijuana in California

Mental Health and Substance Abuse MCLE

“The Court’s experience has shown that lawyers have not been seeking out or cannot find continuing legal education programs that might offer meaningful help in addressing their own substance abuse and mental health issues or those of their colleagues.”

- *Illinois Supreme Court Chief Justice Lloyd A. Karmeier*

Attorneys Rank High in...



The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

- Landmark study by Hazelden Betty Ford Foundation and the ABA
- Sample size of 12,825 licensed, employed attorneys
- Completed surveys assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.
- Compared attorneys with other professionals, such as physicians, and found that lawyers experience alcohol use disorders at a far higher rate than in other professions, and mental health distress is more significant among lawyers than other professional populations.

Patrick R. Krill, et al., Journal of the American Society of Addiction Medicine, January/February 2016, Vol. 10, Issue 1, pp. 46–52.

Alcohol Use Disorders Identification Test (AUDIT)

- Developed by the World Health Organization (WHO) in 1989
- 10-item self-report instrument to screen for hazardous use, harmful use, and the potential for alcohol dependence
- Currently available in 40 languages
- Generates scores ranging from 0 to 40
 - 8-15: Most appropriate for simple advice focused on the reduction of hazardous drinking
 - 16-19 suggests brief counseling and continued monitoring
 - 20+ warrants further diagnostic evaluation for alcohol dependence

Questions	0	1	2	3	4	
1. How often do you have a drink containing alcohol?	Never	Monthly or less	2 to 4 times a month	2 to 3 times a week	4 or more times a week	
2. How many drinks containing alcohol do you have on a typical day when you are drinking?	1 or 2	3 or 4	5 or 6	7 to 9	10 or more	
3. How often do you have 5 or more drinks on one occasion?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
4. How often during the last year have you found that you were not able to stop drinking once you had started?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
5. How often during the last year have you failed to do what was normally expected of you because of drinking?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
6. How often during the last year have you needed a first drink in the morning to get yourself going after a heavy drinking session?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
7. How often during the last year have you had a feeling of guilt or remorse after drinking?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
8. How often during the last year have you been unable to remember what happened the night before because of your drinking?	Never	Less than monthly	Monthly	Weekly	Daily or almost daily	
9. Have you or someone else been injured because of your drinking?	No		Yes, but not in the last year		Yes, during the last year	
10. Has a relative, friend, doctor, or other health care worker been concerned about your drinking or suggested you cut down?	No		Yes, but not in the last year		Yes, during the last year	
						Total

Study Results – Alcohol Use

- Substantial rates of behavioral health problems were found.
- 20.6% of study participants screened positive for hazardous, harmful, and potentially alcohol-dependent drinking.
- Men had a higher proportion of positive screens.
- Younger participants and those working in the field for a shorter duration also had a higher prevalence.
- Study respondents 30 years of age or younger were more likely to have a higher score than their older peers.

Drug Abuse Screening Test-10 (DAST)

- 10-item, self-report instrument designed to screen and quantify consequences of drug use in both a clinical and research setting.
- DAST scores range from 0 to 10 and are categorized into low, intermediate, substantial, and severe-concern categories.

These questions refer to the past 12 months.			No	Yes
1.	Have you used drugs other than those required for medical reasons?	0	1	
2.	Do you abuse more than one drug at a time?	0	1	
3.	Are you always able to stop using drugs when you want to? (If never use drugs, answer "Yes.")	1	0	
4.	Have you had "blackouts" or "flashbacks" as a result of drug use?	0	1	
5.	Do you ever feel bad or guilty about your drug use? If never use drugs, choose "No."	0	1	
6.	Does your spouse (or parents) ever complain about your involvement with drugs?	0	1	
7.	Have you neglected your family because of your use of drugs?	0	1	
8.	Have you engaged in illegal activities in order to obtain drugs?	0	1	
9.	Have you ever experienced withdrawal symptoms (felt sick) when you stopped taking drugs?	0	1	
10.	Have you had medical problems as a result of your drug use (e.g., memory loss, hepatitis, convulsions, bleeding, etc.)?	0	1	

DAST-10 Score	Degree of Problems Related to Drug Abuse	Suggested Action
0	No problems reported	None at this time
1-2	Low level	Monitor, re-assess at a later date
3-5	Moderate level	Further investigation
6-8	Substantial level	Intensive assessment
9-10	Severe level	Intensive assessment

Study Results – Drug Use

- Among the entire sample, 26.7% of participants completed the DAST.
- Rates of Concern
 - Low: 76.0%
 - Intermediate: 20.9%
 - Substantial: 3.0%
 - Severe: 0.1%
- “Data collected from the DAST were found to not meet the assumptions for more advanced statistical procedures. As a result, no inferences about these data could be made.”

Mental Health – Depression Anxiety Stress Scales-21 (DASS-21)

- Self-report instrument consisting of three 7-item subscales
- Assesses symptoms of
 - Depression
 - Anxiety
 - Stress
- Individual items are scored on a 4-point scale (0-3), allowing for subscale scores ranging from 0 to 21

The rating scale is as follows:

- 0 Did not apply to me at all
- 1 Applied to me to some degree, or some of the time
- 2 Applied to me to a considerable degree or a good part of time
- 3 Applied to me very much or most of the time

1 (s)	I found it hard to wind down	0	1	2	3
2 (a)	I was aware of dryness of my mouth	0	1	2	3
3 (d)	I couldn't seem to experience any positive feeling at all	0	1	2	3
4 (a)	I experienced breathing difficulty (e.g. excessively rapid breathing, breathlessness in the absence of physical exertion)	0	1	2	3
5 (d)	I found it difficult to work up the initiative to do things	0	1	2	3
6 (s)	I tended to over-react to situations	0	1	2	3
7 (a)	I experienced trembling (e.g. in the hands)	0	1	2	3
8 (s)	I felt that I was using a lot of nervous energy	0	1	2	3
9 (a)	I was worried about situations in which I might panic and make a fool of myself	0	1	2	3
10 (d)	I felt that I had nothing to look forward to	0	1	2	3
11 (s)	I found myself getting agitated	0	1	2	3
12 (s)	I found it difficult to relax	0	1	2	3
13 (d)	I felt down-hearted and blue	0	1	2	3
14 (s)	I was intolerant of anything that kept me from getting on with what I was doing	0	1	2	3
15 (a)	I felt I was close to panic	0	1	2	3
16 (d)	I was unable to become enthusiastic about anything	0	1	2	3
17 (d)	I felt I wasn't worth much as a person	0	1	2	3
18 (s)	I felt that I was rather touchy	0	1	2	3
19 (a)	I was aware of the action of my heart in the absence of physical exertion (e.g. sense of heart rate increase, heart missing a beat)	0	1	2	3
20 (a)	I felt scared without any good reason	0	1	2	3
21 (d)	I felt that life was meaningless	0	1	2	3

Mental Health – DASS-21

Severity	DASS21-D	DASS21-A	DASS21-S
Normal	0-9	0-7	0-14
Mild	10-13	8-9	15-18
Moderate	14-20	10-14	19-25
Severe	21-27	15-19	26-33
Extremely severe	28+	20+	34+

DASS21-D: Depression sub-scale of The Depression Anxiety and Stress Scales 21 items; DASS21-A: Anxiety sub-scale of The Depression Anxiety and Stress Scales 21 items; and DASS21-S: Stress sub-scale of The Depression Anxiety and Stress Scales 21 items.

Source: [5].

Study Results – Mental Health

- Severity: Mild or higher
 - Depression: 28%
 - Anxiety: 19%
 - Stress: 23%
- Demographics (11,516 participants)
 - **Sex:** Men reported depression, anxiety, and stress more often than women
 - **Age:** Highest reports between ages 31 and 40, approximately twice as much as those in 30 or younger category
 - **Years in Field:** Significantly higher reports among those in their first 10 years of practice
 - 0-10 Years: ~4,300
 - 11-20 Years: ~2,800
 - 21-30 Years: ~2,500
 - 31-40 Years: ~2,070

Reasons for Problems Among Attorneys

“[Lawyers tend to] prioritize success and accomplishment over things like balance, personal well-being, health, etc. . . . [Attorneys go through training] where they are taught to work harder, play harder, and assume the role of a tough, capable and aggressive professional without personal weaknesses or deficiencies . . . Heavy drinking, lack of balance and poor self-care are entirely normalized. That’s the behavior that young lawyers see being modeled all around them, and throughout the profession.”

- Patrick R. Krill, author of Hazelden-ABA study

Reasons for Problems Among Attorneys

- False belief we can handle issues on our own.
- Fear of negative impact on reputation.
- Concern about disciplinary action and lack of diversion programs.
- Profession's inherent emphasis on intellectualism—prohibits the emotional introspection necessary to recognize the value of therapy and comprehensive addiction treatment.
- The high-achieving personality of a lawyer can often develop as a stubborn sense of “always being right” – furthering his or her denial.

Cost to Attorneys

- California and New York ABA survey: “50-70 percent of all disciplinary cases involved alcohol.”
- 61 percent of lawyers entering Oregon State Bar Professional Liability Fund had disciplinary complaints; 60 percent had malpractice suits filed.

G. Andrew H. Benjamin, Bruce D. Sales & Elaine J. Darling, Comprehensive Lawyer Assistance Programs: Justification and Model, 16 L. & PSYCHOL. REV. 113, 115 (1992)

Cost to Attorneys

California Rules of Professional Conduct

- “A lawyer shall act with reasonable diligence and promptness in representing a client.” R. 1.3.
- “A lawyer shall:
 - . . .
 - (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter” R. 1.4(a).

Resources for Attorneys

- California Lawyer Assistance Program
 - <https://www.calbar.ca.gov/Attorneys/For-Attorneys/Lawyer-Assistance-Program>
- ABA Commission on Lawyer Assistance Programs
 - https://www.americanbar.org/groups/lawyer_assistance/
- ABA Well-Being Toolkit for Lawyers and Legal Employers
 - https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_well-being_toolkit_for_lawyers_legal_employers.pdf
- The Other Bar
 - <https://otherbar.org/>

Mental health and substance abuse issues frequently arise in the workplace

- Drug Testing
- Absenteeism Issues
- Poor Work Performance
- Harassment
- Threats of Violence

Laws that come into play when dealing with employee mental illness or substance abuse

- Americans with Disabilities Act (ADA)/ADA Amendments Act (ADAAA)
- Family and Medical Leave Act (FMLA)
- Occupational Safety and Health Act (OSHA)
- California Occupational Safety and Health Act (Cal/OSHA)
- California Family Rights Act (CFRA)
- California Workers' Compensation and Insurance
- California Compassionate Use Act
- California Medical Marijuana Program Act

EEOC Guidance:

- Employer ADA obligations in the face of employee drug or alcohol use
 - https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm
- The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work
 - Alcoholism and Illegal Use of Drugs
 - <https://www.eeoc.gov/facts/performance-conduct.html#alcohol>

Does the ADA protect employees with substance abuse problems?

- ADA may protect a “qualified” alcoholic who can meet the definition of “disability.”
- ADA does not protect an individual who currently engages in the illegal use of drugs.
- ADA may protect a recovered drug addict who:
 - is no longer engaging in the illegal use of drugs, and
 - can meet the other requirements of the definition of “disability,” and who is “qualified.”

May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?

- Yes
- Poor job performance or unsatisfactory behavior, such as:
 - absenteeism, tardiness, insubordination, or on-the-job accidents
 - related to an employee's alcoholism or illegal use of drugs
 - need not be tolerated if similar performance or conduct would not be acceptable for other employees.

May an employer discipline an employee who violates a workplace policy that prohibits the use of alcohol or the illegal use of drugs in the workplace?

- ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace.
- Employee who violates such policies, even if the conduct stems from alcoholism or drug addiction, may face the same discipline as any other employee.
- ADA also permits employers to require that employees not be under the influence of alcohol or the illegal use of drugs in the workplace.

May an employer suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to its Employee Assistance Program (EAP) in lieu of discipline?

- Yes.
- Employer may discipline the employee, suggest that the employee seek help from the EAP, or do both.
- Employer will always be entitled to discipline an employee for poor performance or misconduct that results from alcoholism or drug addiction.
- Employer may choose instead to refer an employee to an EAP or to make such a referral in addition to imposing discipline.
- ADA does not require employers to establish employee assistance programs or to provide employees with an opportunity for rehabilitation in lieu of discipline.

Must an employer provide a “last chance agreement” to an employee who otherwise could be terminated for poor performance or misconduct resulting from alcoholism or drug addiction?

- Employer may choose, but is not required by the ADA, to offer a “last chance agreement” to an employee who otherwise could be terminated for poor performance or misconduct that results from alcoholism or drug addiction.
- Under a “last chance agreement” an employer agrees not to terminate the employee in exchange for an employee’s agreement to receive substance abuse treatment, refrain from further use of alcohol or drugs, and avoid further workplace problems.
- A violation of such an agreement usually warrants termination because the employee failed to meet the conditions for continued employment.

CALIFORNIA RECREATIONAL MARIJUANA USE IN THE WORKPLACE

CA Legalizes Recreational Marijuana Use



- On November 8, 2016, California voters approved Proposition 64, making California the fifth state to legalize recreational marijuana, after Colorado, Washington, Oregon, and Alaska.
- Any person over 21 years of age can use, possess, transport, share, or purchase up to 28.5 grams of marijuana for recreational use.
- Permits adults to grow up to 6 living plants for personal use.
- Effective Dates:
 - November 9, 2016: Proposition 64 legalized using and growing marijuana for personal use.
 - January 1, 2018: Proposition 64 allows for the sale and taxation of recreational marijuana.



Impact on the Workplace

- Proposition 64 does not “amend, repeal, affect, restrict or preempt . . . the rights and obligations of public and private employers 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 marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.”
- “No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users . . . Instead of attempting the impossible, as we shall explain, California’s voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. ***Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees.***” *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 926 (2008).

A Matter of Policy

- An employer's substance abuse policy can prohibit an employee from using or being under the influence of marijuana, including medical marijuana, at work.
- A policy making it clear that employees are prohibited from being impaired by marijuana can provide direction to employees and supervisors and can help employees understand that activity which is legal under state law may not prevent them from losing their jobs.
- Policies should prohibit employees from the use, sale, possession, and having illegal drugs in their system while at work.

Drug Testing

- California law on drug testing is perhaps the most unsettled of any state's drug testing law. California drug testing restrictions are based on judicial decisions balancing employers' rights to test against employees' state constitutional right to privacy.
- In California, employee drug testing programs are regulated primarily by the privacy provision of the California Constitution. Unlike most constitutional provisions, California's protection extends not only to the activities of government but also to private employers. Drug and alcohol testing programs clearly implicate individual privacy rights for both public and private employees. *See Hills v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1 (1994).
- This does not mean that testing is unlawful!

How and When Employees Can Be Tested

- Pre-Employment Drug Testing:
 - 1) testing that is part of the hiring process after an offer of employment is made, but before hiring actually occurs (“conditional offer of employment”); or
 - 2) testing that occurs sometime soon after the individual begins work but passing the drug test is made a condition of employment.
- Drug Testing During Employment:
 - Part of Physical Examination
 - Reasonable Suspicion (accidents included)
 - What is reasonable suspicion?
 - “More than suspicion” and less than probable cause
 - Balancing of employee’s reasonable expectation of privacy against the employer’s legitimate interest in imposing a test
 - Public sector employers, in contrast, typically must articulate a “compelling” interest to justify the “search” under the Fourth Amendment.

EMPLOYER'S DUTY TO ACCOMODATE

Rehab Leave: California Labor Code Sections 1025-1028

- Every private employer regularly employing **25 or more employees** shall reasonably accommodate any employee who wishes to **voluntarily enter and participate in an alcohol or drug rehabilitation program**, provided that this reasonable accommodation **does not impose an undue hardship on the employer**. Nothing in this chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others.
- The employer shall make **reasonable efforts to safeguard the privacy of the employee** as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program.
- Nothing in this chapter shall be construed to require an employer to provide time off with pay, except that an **employee may use sick leave** to which he or she is entitled for the purpose of entering and participating in an alcohol or drug rehabilitation program.

Addictions and the FMLA/CFRA

- The Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) require covered employers to provide up to 12 weeks of unpaid leave for a “serious health condition” to employees who:
 - Have been employed for at least twelve months (need not be consecutive); and
 - Have worked at least 1,250 hours in the twelve months prior to the qualifying event.
- Addictions are considered “serious health conditions.”
- Applies to all addictions – even if the addiction is due to illegal drug use.

ADA/FEHA

- The Americans with Disabilities Act (ADA) and California's Fair Employment Housing Act (FEHA) protect qualified individuals with a disability who can perform the essential functions of the job with or without reasonable accommodation.
- A disability is:
 - A physical or mental impairment that substantially limits one or more major life activities;
 - A record of such an impairment; or
 - Being regarded as having such an impairment.
- **However**, employers have no duty to accommodate medical marijuana use.
 - *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008)
 - *Espindola v. Wismettac Asian Foods, Inc.*, No. 2:20-cv-03702 (C.D. Cal. Apr. 28, 2021)

Questions?

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Thank **you.**