Title 2. Administration
Division 1. Administrative Personnel
Chapter 3. Department of Human Resources
Subchapter 1. General Civil Service Rules
Article 29. Substance Abuse
§ 599.963. Testing Process and Standards

INITIAL STATEMENT OF REASONS

INTRODUCTION

The California Department of Human Resources (CalHR) maintains a drug testing program for state employees in sensitive positions to ensure the health and safety of others. This program is set forth in California Code of Regulations (CCR), Title 2, Section (§) 599.960 through § 599.966[1], and permits drug testing when there is a reasonable suspicion the employee has used or is under the influence of unauthorized drugs or other illegal mind-altering substances. It also requires random testing for excluded and exempt state employees who are peace officers.

Currently, marijuana/cannabinoids (THC) is one of the substances that must be screened during both reasonable suspicion and random drug testing; however, the current Memorandum of Understanding (MOU) for Bargaining Unit (BU) 6 employees (Corrections: Employees providing custody, supervision, and treatment of wards and inmates remanded to state custody) exempts them from random testing for this substance. Historically, drug testing for this substance, as well as all other substances to be tested under the program, have been completed through urinalysis testing, which only shows the presence of nonpsychoactive metabolites of THC.

PROBLEM STATEMENT

In 2024, Government (GOV) Code § 12954 became operative, which generally limits employers from discriminating against individuals for their use of cannabis off the job and away from the workplace, or based on an employer-required drug screening test showing the presence of nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. While urinalysis testing does not show the presence of psychoactive compounds of THC, employers can avoid being out of compliance with GOV Code § 12954 by using oral fluid testing, which has been scientifically proven to show the presence of the psychoactive compounds of THC. There are currently no scientifically accepted standards or cutoff levels for oral fluid testing demonstrating impairment from the use of THC.

Currently, CCR § 599.963 does not specify whether oral fluid testing may be used, nor does it specifically provide for cutoff levels to be used in such testing. Additionally, it does not distinguish between the substances to be tested for reasonable suspicion and random drug testing.

[1] All further regulatory references are to Title 2 of the CCR, unless otherwise specified.

The appointing power holds all liability for any harm caused by an act or omission related to safety sensitive work by an employee who is under the influence of a substance. Thus, the appointing authority should have flexibility to test for a substance when there is reasonable suspicion. Additionally, in situations where medical care becomes necessary due to substance use, it is almost inevitable the testing would occur with or without authorization. For example, if a peace officer was found unconscious and in possession of fentanyl, there would be good cause to suspect the use of same.

CalHR will not establish a separate process from industry best practices. It would also be impossible to do so as CalHR has no authority over, nor direct line of communication to, all laboratory collection sites, doctors' officers, hospitals and medical clinics that may be processing samples.

SPECIFIC PURPOSE OF, AND RATIONALE FOR THE PROPOSED AMENDMENT

§ 599.963 Subsection (a)- Subsection (a) will secure compliance with GOV Code 12954 by establishing standards for oral fluid testing in the drug testing program. Oral fluid testing is the only current testing method available that can confirm the presence of psychoactive compounds of THC. The section is also amended to incorporate updates to applicable statutes enacted since the previous version for reference to breath sample testing using breath alcohol.

§ 599.963 Subsection (b)- Subsection (b) is being amended as the list of substances for "random", Subsection (b) and "reasonable suspicion" Subsection (c) testing are one and the same; however, while CalHR intends to eliminate THC from "random" testing, it is critical that hiring authorities be able to test for the presence of psychoactive metabolites of THC when an employee appears to be impaired. Separating the two lists and including tests for the presence of psychoactive metabolites of THC showing recent use, is critical to ensure safety when a "reasonable suspicion" of impairment exists. Updating the regulation will resolve this issue and align the testing process to conform with GOV Code § 12954.

§ 599.963 Subsection (b) (3)- Subsection (b) (3) is being deleted because there is no scientifically accepted standard or cutoff level to show impairment, the proposed regulatory change will remove THC from the substances to be tested for random testing. Oral fluid tests will be administered for reasonable suspicion in response to observed and documented conduct indicating that the employee being tested is impaired. Oral fluid tests will not be used as a standalone indication of impairment in the workplace.

§ 599.963 Subsection (b), 4, 5, 6, 7, 8, and 9 – these subsections are being deleted and renumbered to address changes in the list and list order.

§ 599.963 Subsection (c)- Subsection (c) is being amended to reflect current practices. CalHR does not contract directly with laboratories, nor does it consult with laboratory staff. The list of substances that shall be tested has been defined numerically to allow

for the reference for optional testing that is not specifically required to be tested but may be warranted in an emergent situation.

§ 599.963 Subsection (d)- Subsection (d) is being amended to incorporate changes to applicable statutes enacted since the previous version and revise existing language to improve clarity, consistency, and alignment with current policy objectives.

§ 599.963 Subsection (e)- Subsection (e) is being amended because the Department has no regulatory authority over the processing of test samples in a clinical setting.

§ 599.963 Subsection (f)- Subsection (f) is being amended to remove the language indicating the department is involved in handling specimens. It is also being amended to clarify chain of custody requirements.

§ 599.963 Subsection (g)- Subsection (g) is being amended to incorporate changes to applicable statutes enacted since the previous version and revise existing language to improve clarity, consistency, and alignment with current policy objectives.

§ 599.963 Subsection (h)- Subsection (h) is being amended to reflect current practices.

§ 599.963 Subsection (i)- Subsection (i) is being added to reflect the process currently being used to confirm positive results consistent with industry standards.

STATEMENT OF ANTICIPATED BENEFITS

Revising the regulation will bring it into compliance with GOV Code § 12954 and its prohibition of employment discrimination based on use of cannabis off the job and away from the workplace and/or the presence of nonpsychoactive cannabis metabolites identified in employer-required drug screening tests.

Revising the regulation will promote worker safety and public safety by ensuring the ability to test for active THC levels in cases of reasonable suspicion as set forth in CCR § 599.962(a) for determining possible violations of CCR § 599.960(b).

Revising the regulation shall reconcile discrepancies between random testing requirements for rank-and-file and affiliated excluded/exempt employees, holding them to the same standard.

ECONOMIC IMPACT ANALYSIS

This regulatory amendment does not create, expand or eliminate businesses within the state, nor does it affect levels of employment through the creation or elimination of jobs.

There will be a minor and absorbable cost increase to participating state agencies that have a need to test for the presence of active THC metabolites in employees working in safety sensitive positions. The requirement for oral fluid testing will increase the cost of each reasonable suspicion testing event. CalHR estimates that the total annual cost will be approximately $4,865 for all state agencies combined. To calculate this, the average

number of reasonable suspicion tests across the state for the past five calendar years (68.5) was multiplied by the additional per test cost for oral fluid testing for marijuana/cannabinoids (THC) ($71). This provides a consistent, evidence-based estimate of the annual fiscal impact.

Because reasonable suspicion tests are conducted on an as needed basis, CalHR cannot anticipate which agencies will need to order reasonable suspicion tests and absorb the costs in any given year.

Studies, Reports or Documents Relied Upon (GC§11346.2(b)(3))

Substance Abuse and Mental Health Services Administration (SAMHSA), Mandatory Guidelines for Federal Workplace Drug Testing, Fed. Reg. 70768, Vol. 88, No. 196 (October 12, 2023) Subpart C – Urine Specimen Tests, Section 3.4

Substance Abuse and Mental Health Services Administration (SAMHSA), Mandatory Guidelines for Federal Workplace Drug Testing, Fed. Reg. 51118, Vol. 62, No. 189 (September 30, 1997)

Substance Abuse and Mental Health Services Administration (SAMHSA), Mandatory Guidelines for Federal Workplace Drug Testing Programs-Oral/Fluid, Fed. Reg. 57554, Vol. 84, No. 207 (October 25, 2019) Subpart C – Urine Specimen Tests, Section 3.4

Federal Motor Carrier Safety Administration, Title 49 Code of Federal Regulations, Part 382 – Controlled Substances and Alcohol Use and Testing (August 17, 2001) Subpart B – Prohibitions

Memorandum of Understanding (MOU) BU 6, Corrections: Sections 9.12, 9.13

REASONABLE ALTERNATIVES

No reasonable alternatives exist. If we do not revise the regulations, the State may be liable for violating the right to medical privacy of state employees by requiring/facilitating urinalysis tests for nonpsychoactive metabolites of cannabis which have no valid employment purpose.

PRESCRIPTIVE VS. PERFORMANCE STANDARD

CalHR has adopted the current standards for drug and alcohol testing comparably to what is set forth in the federal government Mandatory Guidelines for Federal Workplace Drug Testing Programs. This is a prescriptive standard for state-mandated testing as a performance standard could result in inconsistent results.