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OUR FILE NUMBER:

October 17, 2022

MEMORANDUM

TO:



FROM:

Amy W. Estrada

RE:

Inquiries Related to Employee Drug Testing

QUESTIONS PRESENTED

1. Does Vehicle Code 34520.3 require that all employees who drive District vehicles to transport students, such as coaches who occasionally use a van transport students to a sports activity or a staff member who only occasionally uses a van to help transport kids, be subject to the same drug/alcohol testing program as bus drivers when such transportation is not their primary job?
2. Is AB 2188 applicable to school districts? (Is employees' use of marijuana outside of the workplace protected under the new California law?)

LEGAL RESEARCH

1. Vehicle Code section 34520.3 — application to non-transportation employees

You inquired if Vehicle Code section 34520.3 applies to District employees, such as teachers and coaches, who only occasionally drive students in District-owned vans.

Discussion

Vehicle Code section 34520.3 provides, in relevant part:

A school district or county office of education that employs drivers to drive a school transportation vehicle, and the driver of those vehicles, who are not otherwise required to participate in a testing program...shall participate in a

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program that is consistent with the controlled substances and alcohol use and testing requirements...that apply to schoolbus drivers...

(Veh. Code § 34520.3(b).) There is no case law interpreting or applying this statute. Therefore, the implications of the statute must be interpreted from legislative history. Section 34520.3 was added to the Vehicle Code by Assembly Bill 1052 (2005), and has not been amended since.

Our firm previously looked into this issue at length in 2017, using the Legislative Counsel Opinion accompanying AB 1052. Legislative Counsel Opinions are confidential opinions provided to members of the State Legislature or the Governor, often during the enactment of a new law to provide clarification and analyses on constitutional issues and potential implications of the bill. Due to the confidential nature of these opinions, they are generally not available to the public, though they are occasionally released by individual legislators and included within the legislative history materials of a bill. Our firm obtained the Opinion for AB 1052 previously as part of our prior research into the issue for another client. We reviewed the confidential Legislative Counsel Opinion to provide the confidential attorney-client privileged guidance set forth in this memorandum.

It is important to note that opinions of the Legislative Counsel are not binding on the courts, but they are “entitled to consideration.” (*Walnut Valley Unified School Dist. v. Superior Court* (2011) 192 Cal.App.4th 234, 248, fn. 9, citing *California Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) However, opinions of the Legislative Counsel that are prepared to assist the Legislature in its consideration of pending legislation are generally given greater weight, since those opinions are more demonstrative of legislative intent than opinions issued after legislation has been signed. (See *St Johns Well-Child and Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 983; citing *California Psychology Providers, supra*, 51 Cal.3d at 17.)

The particular Legislative Counsel Opinion interpreting Vehicle Code section 34520.3 was not issued until December 1, 2005, nearly three months after the legislation was signed into law by the Governor on September 22, 2005. As such, the Opinion may be given lesser weight by a court in the event this matter is litigated.

On the other hand, the Opinion cites to relevant materials in the legislative history which may be persuasive to a court. The Opinion first points to the Legislative Counsel’s Digest for Assembly Bill 1052, which states that “[t]he bill would require a school district or county office of education that employs a driver to drive a school transportation vehicle, and that driver of the vehicle, to participate in a program that is consistent with the federal controlled substance and alcohol use testing requirements that apply to schoolbus drivers.” (Legis. Counsel’s Dig., Assem. Bill No. 1052 (2005-2006 Reg. Sess.)) The opinion emphasizes the reference to “that driver of the vehicle,” reasoning that the language indicates an intent that the “provision apply only to a driver who was employed by a school district or a county office of education to drive a school transportation vehicle.” (Ops. Cal. Legis. Counsel, No. 0521615 (Dec. 1, 2005) School Transportation Vehicle Drivers, p. 2-3.)

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Further, the Opinion relies upon certain legislative committee reports which indicate that the intent of the bill was to “[r]equire a school district or county office of education that employs a driver to operate a school transportation vehicle, and that driver of the vehicle, to participate in a program that is consistent with the federal controlled substance and alcohol use testing requirements that apply to school bus drivers.” (Sen. Rules Comm. Analysis for A.B. 0152 (Aug. 24, 2005) p. 2.) The Opinion again highlights the language “that driver of the vehicle,” and determines this language supports a statutory “construction limiting the application of that section to drivers who are employed by a school district or county office of education to drive a school transportation vehicle.” The Opinion concludes: “[I]t is our opinion that Section 34520.3 of the Vehicle Code applies only to employees of a school district or county office of education **who are employed to drive a school transportation vehicle.**” (Ops. Cal. Legis. Counsel, No. 0521615 (Dec. 1, 2005) School Transportation Vehicle Drivers, p. 3 [Emphasis Added].)

Other materials in the legislative history support the same conclusion reached by the Legislative Counsel. For example, in a document completed by the El Dorado County Office of Education (the agency that proposed the legislation), in response to the question “Why is this bill needed?,” the agency states, “Under current law, there is no requirement to drug test those who, **as a primary part of their job function** transport children in a vehicle other than by bus.” (Background Information Request for Sen. Transportation and Housing Comm., emphasis added). Further, in the El Dorado County Office of Education’s request to Assembly Member Tim Leslie for bill sponsorship, as well as Mr. Leslie’s proposal to the Legislative Counsel to enact this law, the suggestion was initially to amend Vehicle Code section 34520 to read, in relevant part:

Motor carriers, ~~and~~ drivers, *and any person employed by a school district or county office whose duty and primary responsibility is to transport children* shall comply with the controlled substances and alcohol use, transportation, and testing requirements....¹

(Letter from Vicki L. Barber, Ed.D. Superintendent, El Dorado County Office of Education, to Tim Leslie, California Assemblyman (Jun. 15, 2004); *see also* Letter from Tim Leslie, California Assemblyman, to California Legislative Counsel (Dec. 16, 2004).) Thus, the original intent behind the bill’s proposal was to bring employees who are hired to perform a job akin to schoolbus drivers, but utilizing a smaller vehicle, within the ambit of drug and alcohol testing requirements. However, it is important to note that even this intent expressed by the original proponents of the bill is not controlling, as the Legislature could have ultimately determined that broader language was necessary to cover more employees. This is potentially evidenced by the fact that the Legislature determined to enact a separate statute, rather than amending Vehicle Code section 34520 using the language initially proposed (above). Moreover, the Supreme Court of California has previously refused to consider the “motives and understandings of an individual legislator even if he or she authored the statute.” (See *Grupe Development Co.*, *supra*, 4 Cal.4th

¹ Text shown in ~~strikeout~~ or italics indicates proposed amendments to the statutory language.

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at 922, citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801, fn. 2; accord, *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589.)

Conclusion

Although the statutory language at issue is ambiguous, and thus our opinion is not free from doubt, we conclude Vehicle Code section 34520.3 does not apply to employees who are not hired for transportation purposes, such as teachers and coaches who only occasionally transport students and are not otherwise primarily employed for student transportation purposes.

2. AB 2188 — application to school district employers

You inquired whether AB 2188 is applicable to school districts such that district employees' use of cannabis outside of the workplace is not protected under the new law.

Discussion

In August 2022, the California Legislature passed Assembly Bill 2188 to add section 12954 to the Government Code. Governor Newsom signed AB 2188 on September 18, 2022 and it takes effect on January 1, 2024, giving employers approximately one year to prepare for the change in the law. AB 2188 overturns the California Supreme Court decision in *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920, which allowed the rejection of applicants based on pre-employment positive drug tests for cannabis. AB 2188 also amends the California Fair Employment and Housing Act (FEHA) to make it unlawful for an employer to discriminate against a person in any term or condition of employment, including hiring and termination, for use of cannabis off the job and away from the workplace. AB 2188 also prevents employers from discriminating against a person based on an employer-required drug test to detect non-psychoactive cannabis metabolites. However, AB 2188 does not affect an employer's rights or obligations to maintain a drug-free workplace as specified in Health & Safety Code § 11362.45 and pursuant to federal law and regulations.

AB 2188 expressly does not preempt other state or federal laws —such as Vehicle Code sections 34520 (bus drivers) and 34520.3 (school transport vehicles)—that require these applicants or employees to be tested for controlled substances. Specifically, proposed Gov. Code § 12954(e) states:

This section does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

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School districts are notably only required by law to test employees in safety-sensitive positions, such as school bus drivers. Many districts, through adoption of their own Board Policies, conduct drug testing of all applicants. However, there is no requirement in the law to drug test teachers or instructional assistants, for example.

For any other District employee, their use of marijuana **outside** of the workplace would be protected under AB 2188; however, nothing under AB-2188 permits employees to “possess, to be impaired by, or to use, cannabis on the job.” Under the new law, the District would be permitted to administer scientifically valid pre-employment drug screenings that do not screen for non-psychoactive cannabis metabolites, which could indicate **current** use of cannabis, rather than previous use. The new law specifically states: “This [statute] does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.” Such test of employees on the job would require reasonable suspicion that an employee is currently under the influence of marijuana and should be supported by articulable indications of impairment. However, it is important to note, the science on cannabis screening and impairment is evolving and we are not likely to have any generally applicable impairment standards, such as we have with alcohol by the date AB 2188 takes effect.

Put more succinctly, the law indicates that for positions where the law does not require drug testing, that no adverse action/decisions may be made regarding the candidate/employee based on a positive THC/cannabis result unless the test was testing if the employee was currently under the influence of cannabis. The law does not appear to prohibit including that part of the test, however no adverse decision/action can be taken based on that result. Lastly, testing for current intoxication by cannabis is permitted, and the law seems to indicate a belief that there are such tests that can be performed, but in consultation with our firm’s legal expert on the subject it was confirmed that such technology (such as a marijuana breathalyzer test) is still years away from being developed, reliable, and accessible.

Conclusion

AB 2188 generally protects off the job cannabis use by District employees and candidates for employment, unless the employee is required by law to be tested for drugs, including cannabis (such as bus drivers who are required to be tested under other federal and state law).

Re: STV Operator Drug Testing - Vehicle Code 34520.3

FDTSI Corporate <kevin@fdtsi.com>

Wed 11/30/2022 12:39 PM

To: Jennifer Alvarez <jalvarez@brawleyhigh.org>

Hi Jennifer:

Thank you for requesting our opinion of the attached memo issued 10-17-2022. It was very interesting reading 😊

Unfortunately, I must respectfully **disagree** with Ms. Amy W. Estrada from the law offices of Atkinson, Andelson, Loya, Ruud & Romo. Their opinion, based on zero case law, is rather weak, when compared to Student Safety. Their argument of "**Employed Driver**" is **not** consistent with the intent of 34520.3CVC. The overall intent was to expand preventive testing to those drivers who transport students within unregulated vehicles. STUDENT SAFETY was the primary goal!

The examples given within the memo are not case law, nor are they open to public review or consideration. The fact still remains that 34520.3CVC requires **ALL DRIVERS** (*classified as a driver or not*) of Student Transport Vehicles to be tested, without exception. Ms. Estrada's manipulation of "**Employed Driver**" will not withstand or prevent C.H.P. enforcement action for NOT testing, as illustrated within the CHP memo previously distributed.

The California Vehicle Code Section 305 defines a Driver as:

A "driver" is a person who drives or is in actual physical control of a vehicle. The term "driver" does not include the tillerman or other person who, in an auxiliary capacity, assists the driver in the steering or operation of any articulated firefighting apparatus.

The law is clear in this area, and should **not** be avoided or circumvented, simply because a Union or employee is contesting its implementation.

It is a matter of public and student safety and trust that the District test ANYONE who transports students within Student Transport Vehicles, in accordance with State Law 34520.3CVC.

The SAFETY of our kids far outweighs a loose interpretation of who is an eligible "Driver".

Thank you for allowing us to help :-)

Kevin Odenbaugh, D.A.P.M.

President/CEO

Consultation & Compliance



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From: Jennifer Alvarez <jalvarez@brawleyhigh.org>
Sent: Wednesday, November 30, 2022 11:01 AM
To: FDTSI Corporate <kevin@fdtsi.com>
Subject: STV Operator Drug Testing - Vehicle Code 34520.3

Good morning Kevin,
Attached for your review is the legal analysis on Vehicle Code 34520.3.
Jennifer

Jennifer D. Alvarez
Human Resources Director
Brawley Union High School District

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DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

INFORMATION BULLETIN



January 12, 2006

NEW VEHICLE CODE SECTION 34520.3 SCHOOL TRANSPORTATION VEHICLES

On September 29, 2005, the Governor signed into law Assembly Bill (AB) 1052 (Chapter 324, Stats 2005), adding Section 34520.3 to the Vehicle Code, pertaining to drug and alcohol testing for drivers of "school transportation vehicles" (STVs), as defined in the section. The purpose of this Information Bulletin (IB) is to inform the motor carrier industry and enforcement personnel about this new section, which becomes effective January 1, 2006.

According to the new statute, an STV "is a vehicle, that is not a school bus, school pupil activity bus, or youth bus, and is used by a school district or county office of education for the primary purpose of transporting children." Many school districts or county offices of education purchase or rent/lease passenger vehicles (capacity ten or less) to transport small groups of pupils to and from school related activities. Operation of such vehicles does not require the driver to have any special driver license or certificate.

The new statute requires a school district or a county office of education to ensure employee STV drivers, not otherwise subject to drug and alcohol testing, participate in a drug and alcohol testing program "consistent with" Title 49, Code of Federal Regulations Part 382.

It is important to note the statute does not provide California Highway Patrol or other law enforcement personnel statutory authority to request or inspect drug and alcohol testing records of STV drivers. Absent any regulatory authority over STV drivers, a search warrant or other court order may be necessary to obtain testing records as part of an investigation resulting from an incident involving an STV.

Questions regarding the contents of this IB may be directed to Mr. Don Callaway, Commercial Vehicle Section, at (916) 445-1865.

OFFICE OF THE COMMISSIONER

OPI: 062

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