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Marijuana in the Workplace: What Can An Employer Do?

PRESENTED BY

Alison D. Alpert and
Joseph Ortiz



Marijuana Trends

- Medical cannabis is currently legal in 26 states and D.C.
- Recreational cannabis is legal in:
 - Alaska
 - California
 - Colorado
 - Maine
 - Massachusetts
 - Nevada
 - Oregon
 - Washington
 - Washington D.C.



FEDERAL LAW OVERVIEW



Labor & Employment Law



FEDERAL LAW

- **THE FEDERAL STANCE – Cole Memo**

- Official DOJ policy since 2013
- While Marijuana Remains “Illegal,” The Cole Memo Focuses DOJ efforts on:
 - Preventing distribution of marijuana to minors;
 - Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
 - Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
 - Preventing state-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs;
 - Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
 - Preventing drugged driving;
 - Preventing the growing of marijuana on public lands; and
 - Preventing marijuana possession or use on federal property.
- Otherwise, if it is legal in the state, the DOJ will not interfere



FEDERAL LAW

- The Cole Memo is simply DOJ policy
- This means it can be altered in the new administration.
- President-Elect Trump's nominee for Attorney General, Jeff Sessions, is a vocal opponent of marijuana legalization and may alter the DOJ policy if he is confirmed.



CALIFORNIA LAW OVERVIEW



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MEDICAL MARIJUANA

- **Proposition 215 (Prop 215), the Compassionate Use Act of 1996, and Senate Bill (SB) 420**
- Prop 215 is another term for the Compassionate Use Act of 1996.
- Provides protections to seriously ill persons who have their doctor's recommendation to use marijuana for medical purposes.
- Also provides protections to the physicians and primary caregivers who assist these seriously ill persons, who are known as "qualified patients" under SB 420 (Chapter 875, Statutes of 2003). SB 420 was enacted into the Health and Safety Code of California (Sections 11362.7 through 11362.83) to address problems with Prop 215.
- SB 420 required the California Department of Public Health (CDPH) to create the Medical Marijuana Program (MMP). The state MMP is responsible for developing and maintaining an online registry and verification system for Medical Marijuana Identification Cards or "MMICs." MMICs are available to qualified patients and their primary caregivers.



MEDICAL MARIJUANA

MMRSA



- In 2015, the Medical Marijuana Regulation and Safety Act (MMRSA) was enacted
- Three bills (AB 243, AB 266, and SB 643)
- Created more robust regulations of *medical* marijuana
- Allowed for strong local control



What is Proposition 64?



- The Adult Use of Marijuana Act (AUMA)
- Passed on November 8, 2016
- Legalized recreational use of marijuana by adults in California
- Effective November 9, 2016



Proposition 64

- Allows:
 - Personal use by those 21 years of age or older
 - Possession of up to 28.5 grams of cannabis plant material or 8 grams of concentrate
 - Indoor cultivation of up to 6 plants for personal use inside a private residence or accessory structure, and possession of any marijuana produced by those plants



Proposition 64



- State excise tax of 15% on medical and recreational marijuana
- State cultivation tax of \$9.25 on flower/\$2.75 on non-flower plant leaf for medical and recreational
- Creates Division 10 of the B&P Code to license marijuana businesses



Proposition 64

- Allows local governments to ban:
 - Recreational retailers
 - Medical dispensaries
 - Any delivery service originating from or terminating in jurisdiction
 - Outside cultivation
 - Any other state-licensed marijuana business licensed under Division 10



Personal Marijuana Use

- A local government cannot ban personal use in a private residence.
- A local government can ban use of marijuana **in all other contexts**, including use in public spaces, on-site use at dispensaries or retailers, or use in any public space within 1,000 feet of a school, park, or other public gathering space



Proposition 64



- Now AUMA has passed, some of its provisions, including recreational use and personal cultivation, took effect on November 9, 2016
- Limited Guidance to Employers on How to Handle



EMPLOYMENT OVERVIEW



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RECREATIONAL MARIJUANA (Prop 64)

PROPOSITION 64
PROVIDES LITTLE
GUIDANCE ON
EMPLOYMENT ISSUES



Who cares, isn't it legal?



Employers Are Still Concerned About Drugs and Alcohol In the Workplace



WORKPLACE SUBSTANCE ABUSE

SUBSTANCE ABUSE IMPACTS THE WORKPLACE IN MANY WAYS...

- 70% of current illegal drug users are employed
- **They make up 11% of the workforce**
- 90% of alcoholics are employed



Why Employers Are Concerned About Drugs In The Workplace

- About 10 million Americans use marijuana;
- About 2 million Americans use cocaine;
- About 6.5 million employees use marijuana; and,
- About 1.25 million employees use cocaine.



Why Employers Are Concerned About Drugs In The Workplace

- Colorado in 2014 (year opened retail shops) - Marijuana related traffic accidents increased 32%, 12% fatalities involved those “impaired” by marijuana
- Drug-Users Are:
 - 2.5x more likely to have absences > 7 days;
 - 3.6x more likely to injure themselves or co-worker in workplace accident;
 - 5x more likely to be injured in accident off job, affecting attendance/performance on job;
 - 1/3 less productive.



WORKPLACE SUBSTANCE ABUSE

- Employees who tested positive on pre-employment drug tests at Utah Power and Light were 5 times more likely to be involved in a workplace accident as those who tested negative.
- Drug-using employees at GM average 40 sick days a year compared to 4.5 sick days a year for non-using employees.



If It's Legal Can I Discipline an Employee for Using Marijuana?

- Yes!
- *Ross v. Ragingwire Telecommunications, Inc.* (Cal. S.Ct. 2008)
- Claim under FEHA and Wrongful Termination in Violation of Public Policy
- Court held that state law was not intended to interfere with employment law.



Ross v. Ragingwire Telecommunications Inc.

- Claim under FEHA for discrimination or failure to accommodate
- Court not focused on FEHA
- Compassionate Use Act-did not address Employer/Employee just immunized from criminal prosecution
- Other States have included protections for employees.



Ross v. Ragingwire Telecommunications Inc.

- Plaintiff argued:
 - Law enacted after the CUA implied have to accommodate use at home- Said CUA does not require accommodation of use on property or premises of place of employment or during hours of employment
 - Legislators who sponsored submitted thought protected employees
- Dissent- decision without compassion and disability discrimination under FEHA



Does this analysis Change Since Recreational Use is Legal?



CALIFORNIA REEFER



Does AUMA Change This?

- No!
- Limited Provisions:
- Purpose and Intent-Allow employers to enact and enforce workplace policies on marijuana
- Section 11362.45-does not affect rights and obligations of employer to maintain drug free workplace or to require accommodate use in the workplace, or affect ability to have policies prohibiting use by employees or prospective employees, or prevent compliance with law



So is it Illegal or Not?

- Marijuana is still illegal under Federal law
- Employers can still rely on that in supporting policies and standards
- Current Law No Employee Protection
- Watching for cases and changes to ADA or other federal or state law



If Marijuana is legalized federally, would change potentially.



LABOR CODE 96(k) CONCERNS

- California Labor Commissioner is authorized to review: “Claims for loss of wages as a the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.”
- FURTHER: Public employers must show a *nexus* between wrongdoing and work to support discipline.



Can You Discipline an Employee for “Lawful” Off Duty Conduct

- *Coats v. Dish Network* (Colo. S.Ct.)- Court held use was not lawful b/c Federal law
- *Curry v. MillerCoors, Inc.* (Dist. Colo.)
- California-Labor Code 98.6-similar
 - Not yet been interpreted that way
 - Generally Based on Constitutional



Additional Cases from Around the Country

- *Brown v. The Home Depot* (Wash. 2015)- same analysis for recreational as for medical- no public policy protection
- *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.* (Or. S.Ct. 2010)- held do not have to accommodate illegal use of drugs (under FEHA like statute)- based on definition of illegal drug
- *Roe v. Teletech* (Wash. 2011)- law only affirmative defense to criminal prosecution, not legal
- *Garcia v. Tractor Supply Company* (Dist. N.M. 2016)- similar finding to *Ragingwire*, question whether state law can require accommodation



ACCOMMODATION OVERVIEW



Do I Have to Accommodate An Employee Who Brings Me Their Medical Marijuana Card?



Review Of Disability Protections Under FEHA And ADA

- Employer cannot discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, hiring, advancement or discharge, and terms, conditions and privileges of employment.
- Employer must make reasonable accommodations to enable an individual with a disability to enjoy equal employment opportunities.
- Employer must engage in the interactive process with the employee.



Interactive Process And Accommodations

- Undue hardship
- Safety of the employee and others
- No obligation to provide the most expensive accommodation
- No available positions (employer is not required to create one)
- **No obligation to accommodate the use of illegal drugs**
- **Nevada, Connecticut and Delaware require accommodation**



James v. City of Costa Mesa (9th Cir. 2012)

- Not Employment Case
- Citizens who wanted reasonable accommodation under Title II (applicable to cities enforcing ordinances against dispensaries) and claims discrimination
- Court held ADA does not protect medical marijuana users
- “Qualified individual with a disability” excludes those currently engaged in illegal drug use



Trends In Other States

- Three States Protect Employees Using Medical Marijuana who test positive on a Drug Test: Arizona, Delaware and Minnesota
- Employers in those States must prove employee impairment, use or possession at work
- Other states prohibit discrimination against registered users but not testing positive
- California has no explicit protections



What Does a Positive Test Show Anyway?

- Can I discipline the employee for off duty use without any evidence they were under the influence?
 - Yes.
 - Review your policy to ensure a positive test is a violation.
- What if it's only medicinal and not recreational?



What if California Passes a Law to Protect Off Duty Marijuana Use

- Determining whether an employee is under the influence is extremely difficult
- Unlike alcohol there is no accepted level (i.e. BAC)
- Positive drug test shows little- may test positive for 30 days
- Law enforcement extensive training to determine under influence- 40 hour course and follow-up



Tests Used by Law Enforcement to Determine Impaired/Under the Influence

Field Sobriety Test used by Law Enforcement:

- Horizontal Gaze Nystagmus (77% Reliable)
- Walk the Line Test
- One Leg Stand
- All require training to administer



New Testing to Determine Influence

- Marijuana Breathalyzer
 - Conducted roadside tests
 - Differentiates between recently used but not impaired and impaired
 - Measures THC Levels
 - About 2 hours after ingestion
- Saliva Drug Swab
 - Question reliability
 - 3-6 hours after use
 - Only tell if met cut-off
- Look to law enforcement for guidance, developing a standard, Colorado 5 nanograms



Getting Law Enforcement Involved

- City's may involve their trained officers
- Determine based on training that appear under influence, and would support testing, and may support discipline
- Negotiations issues in getting your law enforcement involved
- If for criminal, different standard than for employer reasonable cause testing



What if We Want to Accommodate or Allow Marijuana Use

- *Shepard v. Kohl's* (E.D. Cal.)
 - Employee using medical marijuana and did not disclose
 - Employer had revised policy to include an exception for medical marijuana use
 - Injured at work and drug tested
 - Employer terminated employee including for being under the influence
 - Court dismissed FEHA Claims



Shepard v. Kohl's (E.D. Cal.)

- Court did not dismiss all other claims
 - Invasion of Privacy- no because policy generally permitted drug and alcohol test after an accident
 - Breach of Implied Contract and Covenant of Good Faith and Fair Dealing- did not dismiss because of policy said would not terminate for positive drug test
 - Defamation-did not dismiss because terminated for being under the influence and using or consuming on company property, and only evidence was positive drug test
- Lesson: Be Careful About Agreeing to Accommodate or Allow Use



POLICIES



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A Comprehensive Policy Should Include:

- Zero tolerance
- States prohibitions, including prohibiting possessing, consuming, using, testing positive for drugs
- Specifically addresses prescription drugs
- Defines key terms
- Delineates when testing will occur



POLICY, Cont.:

- Describes procedures
- Allows for searches
- Encourages voluntary admission of a drug and/or alcohol problem
- Complies with state and federal requirements pertaining to a drug-free workplace
- Alerts employees to the possible involvement of law enforcement agencies



IN-HOUSE NOTICE

“Passage of Prop 64 – Marijuana Use.”

“...However, marijuana is still illegal under federal law.”

“Importantly, however, the passage of Proposition 64 does not make it acceptable to be under the influence of marijuana at work. Remember that _____ still maintains a zero tolerance policy.”

“Any employee testing positive for marijuana usage, regardless of intoxication level, will be subject to potential termination.”



Keep Employees Up-To-Date With Drug and Alcohol Policies and Expectations.

- Provide in-service training to line level and management employees.



Recommendations

- Review Current Policy
- Remind Employees of the Policy and Employers' Expectations
- If No Current Policy, Consider Adopting One



Thank you for attending.

Alison D. Alpert

Joseph Ortiz

Partners

Best Best & Krieger LLP

www.bbklaw.com



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