

Proposition 19: The Impact on the Workplace

Imagine a workplace where employees show up to work high on marijuana and there is nothing you can do about it. That's what employers can look forward to if Proposition 19 passes.

Proposition 19 seeks to legalize the cultivation, processing, transportation, distribution, and sale of marijuana for personal use in California. This vaguely worded proposition will make sweeping changes in the way employers do business, and require employers to offer extra protections to marijuana users.

If Proposition 19 became law:

- Employers would have to permit to employees to **smoke marijuana at work**.
- Employers would **lose millions** in valuable federal contracts and grants because they would be unable to comply with federal laws outlawing marijuana use.
- Employers would not be able to make **workplace decisions** based on marijuana use.
- Employers would have to provide **a reasonable accommodation** to marijuana users.
- Employers would be required to **pay for marijuana-related accidents** through workers' compensation insurance premiums and liability to third-parties.
- Employers would have to **warn others** about marijuana use in the workplace through a "Prop 65" warning.
- Employers would be unable to comply with their obligations to provide a **safe workplace**.

Smoking Marijuana at Work

Current law: Current law prohibits smoking "tobacco products" in the workplace. See *Cal. Lab. Code* § 6404.5.

Effect of Proposition 19: Because the current anti-smoking law only applies to tobacco products, the proposition would not prohibit employees from smoking marijuana in the workplace. In fact, employers would be required to allow marijuana smoking at work because Proposition 19 would prohibit denial of "any right or privilege" granted by the Act, without defining what that means.

Just as confusing, the Act specifies that users can "possess" or "share" marijuana in a "non-public place," but does not define what a "non-public place" is. In other contexts, California courts have interpreted "public place" narrowly, so most locations are "non-public places." For example, recently, a California court found that even a grocery store was not a public place. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 2010 Cal. App. LEXIS 1171 (2010). So, users would be able to smoke in virtually any workplace.

Establishing a Drug-Free Workplace

Current law: The federal Drug Free Workplace Act (DFWA) requires government grantees and contractors (for contracts over \$100,000) to comply with specific requirements to establish a drug-free workplace. See 41 U.S.C. § 701 *et. seq.* Under federal law, marijuana continues to be an illegal drug. See 41 U.S.C. § 706; *Gonzales v. Raich*, 545 U.S. 1 (2005).

Effect of Proposition 19: Employers could not meet the requirements of the DFWA because the proposition prohibits them from denying "any right or privilege" or discriminating against anyone for marijuana use. Statewide, affected employers could lose millions of dollars in federal funding. Even if

employers know employees are using marijuana—for instance, because employees are required to report arrests for drug use under the DFWA—employers could not act on the information without “discriminating” against marijuana users, which is prohibited under the proposition.

Hiring Known Marijuana Users

Current law: Employers can choose not to hire marijuana users, even medical marijuana users, because medical marijuana statutes do not regulate employers and only affect criminal liability. See *Ross v. RagingWire*, 42 Cal. 4th 920 (2008).

Effect of Proposition 19: Employers would be prohibited from discriminating against marijuana users by taking marijuana use into account when deciding whether to hire an applicant. Any marijuana-smoking job applicant not hired could file a lawsuit claiming marijuana use was the reason, even if the employer had no knowledge of the use. Moreover, unlike alcohol use, which employers can prohibit entirely at work, under Proposition 19, employers could only take action for marijuana use that “actually impairs” work performance.

Testing for Marijuana Use

Current law:

- Pre-employment testing: Under the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA), employers may test applicants for illegal drug use, including marijuana. 42 U.S.C. § 12112 *et. seq.*; *Cal. Gov’t. Code* § 12940. Other tests (such as for alcohol use or legal use of a prescription medication) are medical examinations that can only be conducted after making an offer of employment, and if the test is “job-related and consistent with business necessity.” See *EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*.

Also, cases interpreting the California Constitution suggest that an employer may conduct pre-employment drug tests, as long as the employer has a legitimate and substantial interest in determining whether an applicant is using drugs. See *Loder v. City of Glendale*, 14 Cal. 4th 1846 (1997); *Pilkington Barnes Hind v. Superior Court*, 66 Cal. App. 4th 28 (1998).

- Post-employment testing: The California Constitution protects all individuals’ right to privacy, including private sector employees. Under the Constitution, an employer who wants to test for illegal drug use must balance its interests against the employee’s reasonable expectation of privacy. See *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1998). If an employer has a good reason to test (*e.g.*, the employee caused a workplace accident in suspicious circumstances, the employer observes drug activity in the workplace, etc.) and the employee has no reason to believe the employer won’t test, such as a policy stating that the employer does not conduct testing, the employer can conduct the test.

Effect of Proposition 19:

- Pre-employment testing: Proposition 19’s stated intent is to regulate marijuana “like...alcohol.” If that’s the case, an employer could only test for marijuana use after making an employment offer, and would have to show such testing is “job-related and consistent with business necessity.”
- Post-employment testing: Even if an employer knows an employee is using marijuana at work, the employer could be prohibited from testing because the employee could argue

marijuana use is private—after all, if the employer cannot discriminate based on marijuana use, why would an employee expect to be tested for it?¹

Even worse, an employer could not take any disciplinary action against an employee even if allowed to test, until the marijuana use “actually impaired” the employee’s performance—for example, by causing a workplace accident. So, even if an employee in a safety-sensitive position (e.g., forklift driver, bus driver, etc.) came to work reeking of marijuana smoke, an employer could do nothing unless employee’s work was “actually impaired.” If the same employee came to work reeking of alcohol, the employer would have good reason to test, discipline and even terminate. So, by requiring “actual impairment,” marijuana would be more protected than alcohol.

Accommodating Marijuana Users

Current law: Employers are not required to accommodate employees’ use of marijuana as a reasonable accommodation under the ADA or FEHA. *42 U.S.C. § 12112 et. seq.; Ross, 42 Cal. 4th 920.*

Effect of Proposition 19: Most employees will not even need to request the right to use marijuana as a reasonable accommodation—Proposition 19 would give them the automatic right to use it. But, for employees who have medical problems alleviated by marijuana who want even more rights than the proposition expressly provides—for example, extra breaks to smoke frequently throughout the day, an adjusted schedule to come in late or leave early, or special work conditions like the provision of paraphernalia or a room to smoke—the employee may request a reasonable accommodation for that purpose. Employees who say they have to smoke marijuana for medical reasons would then have a right to be reassigned to easier duties so their job does not interfere with their marijuana smoking.

Federal law does not require an employer to provide these kinds of accommodations, because marijuana is an illegal drug under the Controlled Substances Act (CSA) and the federal government continues to have jurisdiction to regulate its use. *See Gonzales, 545 U.S. 1.* But, whether the federal government will interfere and actually enforce the CSA is doubtful, based on the Obama Administration’s decision not enforce federal drug laws against individuals who comply with state medical marijuana use laws. *See October 19, 2009, Memorandum from David W. Ogden.*

Paying for Marijuana-Related Accidents

Current law: Excludes from workers’ compensation liability injuries caused by “alcohol or the unlawful use of a controlled substance.” *Cal. Labor Code § 3600.* Marijuana is a controlled substance. *See Cal. Health and Safety Code § 11054.*

Effect of Proposition 19: The definition of “controlled substance” is unchanged by Proposition 19, but marijuana use will no longer be “unlawful,” so marijuana-induced accidents may **not** be excluded from liability. Employers could face millions of dollars in increased premium costs to insure against the cost of marijuana-related accidents.

On the other hand, if a user is injured while working and the injury is not covered by workers’ compensation, the employee could sue the employer for damages, resulting in millions of dollars in liability for the business community.

Paying for Injuries to Others

Current law: Employers can prohibit recreational employee marijuana use. When an employee injures a third party because the employee was under the influence of marijuana in violation of the employer’s

rules, the employer can argue the employee was acting outside the scope of employment and avoid liability. See *Calrow v. Appliance Industries, Inc.*, 49 Cal. App. 3d 556 (1975).

Effect of Proposition 19: Employers can face new claims of third-party liability when their employees injure their co-workers or outside parties. For example:

- An employer could be stuck with increased workers' compensation premiums, leave obligations, or accommodation obligations to other employees who are injured by workplace marijuana users.
- An employer could face insurance, lawsuit, and settlement costs for employees who injure outsiders as a result of their marijuana use.

Eliminating Threats to Workplace Safety

Current law: The federal Occupational Health and Safety Act (OSHA) and its California analog (Cal-OSHA) require employers to furnish a safe workplace. See 29 U.S.C. § 651 *et. seq.*; *Cal. Lab. Code §6400 et. seq.* In California, this includes the duty to create an injury and illness prevention plan that addresses methods and procedures for correcting unsafe or unhealthy conditions. See *Cal. Lab. Code § 6401.7.*

Effect of Proposition 19: Because an employer would only be permitted to act if an employee's marijuana use "actually impairs" job performance, an employer's hands would be tied to take any action based on the perception that an employee's marijuana use is a potential threat in the workplace. Employers could do nothing to prevent users from smoking marijuana and operating heavy machinery or driving on company business unless such use "actually impairs job performance", but would still have the responsibility to provide a safe workplace for employees and customers. This would impose an impossible burden on employers.

Warning Others About Marijuana Smoke

Current law: Proposition 65 requires businesses to post a "clear and reasonable" warning when certain toxins or chemicals are in products, the air, or water. *Cal. Health and Safety Code § 25249.6.* This includes marijuana smoke.

Effect of Proposition 19: Employers could be required to post warnings under Proposition 65 if employees are smoking marijuana in the workplace. Proposition 65 litigation is already a cottage industry. Proposition 19 would give fuel to plaintiffs' attorneys seeking to file lawsuits in this area and result in millions of dollars in litigation costs and potential damages claim.

Keeping Impaired Employees Off the Road

Current law:

- Driving on company time: Employers may specifically prohibit employees from being under the influence of alcohol or drugs while driving.
- Department of Transportation (DOT)-regulated industries: Employers must conduct drug testing (pre-employment, random, post-accident, reasonable suspicion, and return to work) of individuals who hold safety-sensitive positions in the transportation industry, and remove those with a positive test result from such positions. See 49 C.F.R. § 40.23. Last year, the DOT issued a notice that the use of medical marijuana is not a valid medical explanation for a positive test result, ensuring medical marijuana users are not excluded from these safety provisions. See DOT Office of Drug and Alcohol Policy and Compliance Notice, October 22, 2009.

Effect of Proposition 19:

- Driving on company time: Although Proposition 19 specifically “shall not be construed to affect, limit or amend any statute that forbids impairment while engaging in dangerous activities such as driving,” the proposition does not address conduct *before* driving. According to Proposition 19, unless an employee is “actually impaired,” the employer can not do anything to prevent marijuana use before an employee drives. As a result, the employer could not prevent the inherent public safety threat in letting a marijuana user drive, nor preemptively reduce its liability to third parties for injuries sustained as a result of the use.
- DOT-regulated industries: Employers cannot meet DOT requirements and comply with Proposition 19’s prohibition on discrimination.

Taking Adverse Employment Actions

Current law: If an employer takes an adverse action against a poorly performing employee, such as demotion or termination, the employee may claim the adverse action was motivated by discrimination protected by the FEHA. If the employee proves a minimal case for discrimination, the employer must demonstrate a legitimate, nondiscriminatory reason for its actions or face a trial.

Effect of Proposition 19: Proposition 19 would allow marijuana users to claim that an employer’s actions are motivated by marijuana use. Just as with the FEHA, employers would be required to prove the employee’s poor performance, and not marijuana use, justified the personnel action. Inevitably, disgruntled employees’ claims of recreational marijuana use will draw employers into frivolous lawsuits and undermine the at-will employment relationship.