

## **Questions and Answers About Proposition 19's Impact on the Workplace**

Proposition 19 seeks to legalize the cultivation, processing, transportation, distribution and sale of marijuana for personal use in California. However, the measure is written in a way that blurs the line for employers regarding important workplace issues, including whether employers must allow marijuana smoking at work and who will pay for marijuana-related accidents.

Proposition 19, the Regulate, Control and Tax Cannabis Act of 2010, not only would legalize pot use in California but also would create a legal quagmire for employers by compromising workplace safety and establishing a new class of protected workers in the state.

To help employers understand the impact Proposition 19 will have on the workplace, the California Chamber of Commerce has assembled questions and answers based on the recent legal analysis of the measure.

### **Smoking on the Job**

**Q:** Will pot smoking be allowed in the workplace if Proposition 19 becomes law?

**A:** Under Proposition 19, that door certainly would be opened. Because Proposition 19 creates a new protected class of workers, employers would very likely 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 proposition states that users can “possess” or “share” marijuana in a “non-public place” without defining what “non-public place” is, and as such, we must turn to court cases for a definition on public v. non-public places. Recently, a California court found that even a grocery store was *not* a public place. Based on court interpretation, it is reasonable to conclude that users of marijuana would be able to smoke in virtually any workplace.

Current anti-smoking laws don't come into play either. Those cover only tobacco products and therefore the proposition would *not* prohibit employees from smoking marijuana in the workplace.

Even if a local ordinance is enacted that prohibits smoking marijuana in the workplace, employees could smoke just before coming to work or offsite on a break and the employer would have no ability to immediately discipline them when they return to work under the influence of marijuana.

### **Marijuana, Alcohol Workplace Rules**

**Q:** Under Proposition 19, wouldn't marijuana use be the same as alcohol use where workplace rules and regulations are involved?

**A:** No. When proponents of the measure say Proposition 19 will have the same result for marijuana as is the case for alcohol use in the workplace today, they are wrong.

Proposition 19 requires employers to prove “actual impairment” before they can discipline a worker for marijuana use. The standard of “actual impairment” is undefined and untested. Currently, no test for “actual impairment” exists in law.

Under current law, an employer does not need to prove actual impairment to discipline an employee for alcohol or drug use in the workplace. Today, if an employer has a policy that prohibits drug and alcohol use in the workplace, an employee can simply be sent home or disciplined pursuant to the employer’s stated policy. Under Proposition 19, because an employer has to prove “actual impairment,” an accident might have to happen first before an employer could prove that an employee’s drug use compromised safety or impaired performance.

### **Prohibiting Use**

Q: The measure states that an employer could ban employees from using pot if the consumption actually impairs job performance. Between this language and current bans on smoking tobacco at work, wouldn’t it be easy for employers to prohibit marijuana use by their employees?

A: No, the question here becomes (1) what does “actual impairment” mean as this new standard is undefined, and (2) how do you prove “actual impairment”? For example, if a forklift driver showed up reeking of marijuana smoke, an employer could not take disciplinary action under Proposition 19 until it could be proven that the employee’s job performance was “actually impaired” by the marijuana use (for example, after an accident occurred). Under Proposition 19, marijuana use would be more protected than alcohol.

### **Federal Funding**

Q: News reports have stated that federal funding would be jeopardized if Proposition 19 passes. Why is this the case?

A: Marijuana is still illegal under federal law. The federal Drug Free Workplace Act requires that in order to receive grants and other sources of funding, employers must be able to ensure a drug-free workplace. Under Proposition 19, because an employer cannot take into account a person’s prior or current marijuana use, it would be difficult to ensure a drug-free workplace pursuant to federal guidelines. This measure absolutely puts federally funded jobs and projects at risk.

### **Employment Issues**

Q: Why can’t an employer that doesn’t want to hire someone who smokes pot just choose another candidate?

A: Proposition 19 creates a new protected class of workers that doesn’t exist today. Therefore, an employer would not be able to take an applicant’s marijuana use into account when deciding whether to hire an applicant. In addition, an employer that does not hire an applicant who was unqualified for the job, but who also happens to smoke pot, could face a lawsuit with the applicant claiming he or she didn’t get the job because the employer knew the applicant was a pot smoker.

### **Drug Testing**

Q: If an employee seems to be performing poorly on the job, under Proposition 19 can’t the employer just test the employee for pot use to determine if that is the problem and prove “actual impairment?”

A: No, testing would immediately expose an employer to litigation. Because Proposition 19 creates a protected class of workers, an employer's actions to prove marijuana use would very easily be construed as discriminatory. Why would an employer test if the employer is unable to use the results to make a hiring decision or justify a disciplinary action? After a positive drug test, any actions an employer would take related to that employee would certainly be defined as discriminatory. Under Proposition 19, an employer cannot take any action unless and until the employer can show that the employee was "actually impaired," yet the proposition provides no guidance on what "actually impaired" means or how such conduct can be proven.

### **CalChamber Legal Analysis**

Q: What was CalChamber's motivation in preparing the legal analysis of Proposition 19?

A: CalChamber produces employment law products for our members to assist them in navigating through and complying with California's difficult employment laws and regulations. When Proposition 19 qualified for the ballot, we began to look at the measure from the standpoint of employer compliance. That is what led to the legal analysis.

### **November Ballot**

Q: Aren't these just scare tactics to get people to vote no on the measure?

A: No, they aren't scare tactics because the issues are real. This analysis was prepared by an employment law expert who regularly litigates issues just like these. It is clear under Proposition 19 that employers would face a legal quagmire if this measure passes.

Regardless of the intent of the drafters of Proposition 19, the practical result is a new class of protected workers – marijuana users – along with reduced safety, more costs and exposure to litigation in the workplace.

### **'Actual Impairment'**

Q: Proponents claim that Proposition 19 simply restricts employers from discriminating against recreational or medicinal pot smokers who use the drug in private. They claim it is unfair that recreational or medicinal users can't pass drug tests because small amounts of the drug are detectable in a person's system up to 30 days after use, even if that doesn't impair job performance. Why would employers have a problem with what employees do on their own time?

A: Proposition 19 creates a new protected class, thereby restricting an employer's ability to take an adverse action against an employee unless the employee is "actually impaired" from performing the job. There is no test for "actual" impaired job performance. That is a huge issue in how Proposition 19 is written. In addition, the measure sets up a situation where all employers must ignore all marijuana use.

Under this proposal, employers must treat the person who smokes marijuana once every six months the same way as the employee who smokes marijuana six times a day. The measure establishes protections that go well beyond recreational or occasional use. *All* marijuana users would be protected from being singled out or treated differently from any other worker in the same company based solely on their use of the drug. In fact, the very workers who might create a safety risk for their co-workers would be more protected than those placed at risk by the marijuana users' behavior.