

## Marijuana and Workplace Policies

By CalChamber Employment Law Counsel

**P**roposition 64, also known as the Adult Use of Marijuana Act, legalized the recreational use of marijuana for adults 21 years of age and older, imposed a 15 percent excise tax on marijuana sales and established a regulatory framework for the sale of marijuana.

However, despite the passage of Proposition 64, several things didn't change. For example, smoking or ingesting marijuana in public remained unlawful, as did smoking or ingesting marijuana in places where smoking tobacco is also prohibited. Similarly, driving under the influence of marijuana is illegal.

Does this mean employees can consume marijuana at work? California employers could take a deep breath of fresh air, because Proposition 64 maintained the status quo for employers seeking to maintain a drug- and alcohol-free workplace.

In other words, employer policies related to drug possession, use and impairment, as well as testing, are not compromised with the legalization of marijuana use under Proposition 64.

## California and Marijuana

Legalizing marijuana at the ballot box is not new in California. This was the third time legalization of marijuana went before California voters. The first was when voters enacted the Compassionate Use Act of 1996, which allowed for the medicinal use of prescription marijuana but did not allow for recreational use. In an effort to extend legalization to recreational use, Proposition 19 went before the voters in 2010.

Proposition 19 failed to pass by a vote of 46.5 percent to 53.5 percent. CalChamber opposed Proposition 19 because it provided protections to employees who used marijuana and prohibited employers from maintaining a drug-free workplace. However, this is not the same with Proposition 64 — workplace protections remained intact.

## Employers need to communicate and enforce their drug-free workplace policies ...

### Proposition 64's Workplace Protections

Proposition 64 legalized adult recreational use of marijuana. However, such use stops short at the workplace. Proposition 64 explicitly states that it is intended to “allow public and private employers to enact and enforce workplace policies pertaining to marijuana.” The initiative also provides that it will not be construed or interpreted to amend, repeal, affect, restrict or pre-empt:

“The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law” (Section 11362.45 (f)).

With the inclusion of these provisions, Proposition 64 didn't disrupt the current status quo concerning workplace safety and drug prevention.

### Maintaining a Drug-Free Workplace

California employers are accustomed to variations between federal and state law. Although the enactment of Proposition 64 legalized recreational use of marijuana in California, marijuana is still an illegal Schedule I substance under the federal Controlled Substances Act.

Therefore, even with the passage of Proposition 64, employers may continue to prohibit use, possession and impairment at work, and may continue to test for use when appropriate.

Similarly, both federal and state laws require employers contracting with the government to maintain a workplace free from drugs and certify that the business is drug-free. Both federal and state drug-free workplace acts prohibit use of “controlled substances,” as defined under the federal Controlled Substance Act.

Finally, both state and federal law impose strict drug testing and other related requirements on employers and operators engaged in commercial transportation. These employers must continue to comply with these drug-free workplace laws.

What about pre-employment drug testing policies? Pre-employment drug testing is also a lawful mechanism employers may currently use to maintain a drug-free workplace. California employers may conduct pre-employment drug testing of all applicants before hire and deny employment if the drug test comes back positive, even if the applicant was legally using marijuana under the state's Compassionate Use Act, as affirmed by California's high court in the 2008 decision of *RagingWire*, 42 Cal. 4th 920 (2008).

Proposition 64 is not intended to interfere with these workplace policies or practices. In short, these rights and practices aimed at maintaining a safe and drug-free workplace continued even though marijuana was legalized for recreational use.

## **Beginning January 1, 2024, employers cannot discriminate against employees or applicants for cannabis use off the job and away from the workplace.**

However, pre-employment drug testing is becoming increasingly complicated, especially with respect to marijuana. Marijuana compounds and metabolites can stay in someone's system longer than other drugs, so it's possible that a person can test positive for the drug even though that individual hasn't used it for days or weeks, and may not actually be impaired.

In an attempt to address that concern, California passed Assembly Bill 2188, which will take effect **January 1, 2024**. AB 2188 amends California's Fair Employment and Housing Act (FEHA) to specifically prohibit employers from discriminating against an employee or job applicant based on the person's use of cannabis off the job and away from the workplace, which will impact pre-employment testing practices.

The new law provides that employers will still be able to conduct pre-employment drug testing, and an employer can still refuse to hire someone based on test results — but only if the test is a valid pre-employment drug screening that doesn't screen for non-psychoactive cannabis/marijuana metabolites, which can remain in someone's system longer than the psychoactive cannabis compound tetrahydrocannabinol (THC). Valid tests include impairment tests and tests that look specifically for THC.

AB 2188 won't permit an employee to possess, be impaired by or use cannabis on the job, and it maintains employers' rights and obligations in keeping a drug- and alcohol-free workplace.

Prior to its 2024 implementation, employers should work with their testing providers to ensure they are using tests that comply with the state law.

## Don't Let Your Workplace Policies Go Up in Smoke

Employers should periodically review existing policies and remind employees not only about the company's drug-free workplace policy and practices but also to specify that marijuana is also prohibited.

Employees should also be reminded that impairment on the job will not be tolerated, even if the impairment was due to using marijuana offsite prior to coming to work. When reviewing existing policies or creating new ones, make sure your policy clearly states the company's position on drugs in the workplace, including marijuana. In addition, if you conduct pre-employment drug testing, inform all applicants of this policy and clarify that they will also be tested for marijuana use.

Finally, once your policy is reviewed and distributed, be sure to follow the policy and steer clear of any exceptions because making an exception for one person could undermine the policy and set your company up for future litigation. A few other things to consider when developing a drug-free workplace policy:

- Establish a policy banning the use, possession or sale of drugs in the workplace and on company property and banning employees from being under the influence of an illegal or controlled substance while on the job, including alcohol and marijuana.
- Train all supervisors about the company's drug-free workplace policy, emphasizing the seriousness and importance of the policy.
- Train your supervisors to identify signs of drug or alcohol use.
- Clearly communicate your policy and consider re-distributing the policy on an annual basis.

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