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Recreational cannabis in the workplace: A guide for California employers

Do your employees think they can smoke cannabis in the workplace because it's legal? Are your employees telling you that even though they failed a drug test you have to keep them on as employees? Although cannabis usage is now legal in the State of California, employers may still prohibit its use in the workplace.

That smoke you see rising above California is not just from fires or smog. Effective Jan. 1, 2018, California legalized the "recreational" use of cannabis for adults 21 years and older. (California Health & Safety Code § 11362.1.) Proposition 64, the Adult Use of Marijuana Act, contains a number of limitations as to cannabis use, including prohibiting cannabis use in public places, smoking (including "vaping") cannabis in a location where smoking tobacco is prohibited, and using cannabis upon the grounds of a school, day care center or youth center while children are present, or while driving. (§ 11362.1.) Importantly, from an employer's point of view, Proposition 64 provides that employers may continue to prohibit employees from using cannabis in the workplace; and that the new law will not be construed to "amend, repeal, affect, restrict or preempt":

"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 cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employers and prospective employees, or prevent employees from complying with state or federal law." (§ 11302.45(f))

And, of course, cannabis still remains an illegal, Schedule 1 substance, i.e., a narcotic, under federal law. (21 U.S.C. §§ 801-971). Possession of cannabis, even for medical uses, is unlawful under federal law. (See 21 U.S.C. §§ 812, 844(a).) Thus, based not only on Proposition 64, but federal law as well, employers may continue to maintain and enforce drug and alcohol free workplace policies in the Golden State.

While courts outside of California have held that employers cannot terminate the employment of registered medical cannabis users who fail drug tests, *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass 456, 78 N.E.2d 37 (2017), and that employers may not deny employment based on a positive cannabis drug test, *Noffsinger v. SSC Niantic Operating Co. LLC*, ___ F.Supp.3d ___, 2017 WL 3401260 (D. Conn. 2017), California courts, both state and federal, so far have ruled in favor of employers on cannabis issues. See, e.g., *Loder v. City of Glendale*, 14 Cal.4th 846 (1997) (employers have the right to conduct pre-employment drug testing and do not have to accommodate the use of illegal drugs); *Ross v. Raging Wire Telecommunications*, 42 Cal.4th 920 (2008) (upholding employer's discharge of an employee who failed a drug test due to medical cannabis use); *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2010) (medical cannabis users not entitled to protection under the Americans With Disabilities Act).

Thus, despite the new law, California still allows employers to have zero-tolerance drug policies and to fire employees who fail drug tests. Employers must satisfy state law regarding drug testing of prospective and current employees - employers cannot just randomly perform drug tests on employees, however. Employers may conduct drug testing only in limited circumstances:

- during pre-employment screening;
- as part of a physical examination;
- under reasonable suspicion;
- during post-accident testing; or,

- in extremely limited circumstances, as part of random testing of employees in a pervasively regulated industry or in a position critical to public safety or the protection of life property or national security.

So, what can an employer do in light of the ever-shifting legal landscape on cannabis use:

- Establish a “Drug Free Workplace” policy and post it in the workplace and include it in your employee handbooks;
- Make sure you are in compliance with state and local laws when conducting drug testing;
- Update job descriptions of safety-sensitive positions to include a “no drug” policy; and,
- Enforce “no-smoking” policies (tobacco and cannabis) in the workplace.

John Viola, is a partner in Thompson Coburn's [Labor and Employment practice group](#). He can be reached at (310) 282-9407 or jviola@thompsoncoburn.com

authorsTest

john

John L. Viola