



Recreational Marijuana Use Is Now Legal in California: How Does that Impact Employers?

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It's now legal under California law to engage in recreational marijuana use, and it's safe to assume that some of your employees are taking advantage of the newly enacted law. How does that impact your ability to monitor existing employees and screen potential applicants? Not as much as you might think. It does, however, present a big challenge for many employers to ensure employees and applicants understand that, while certain aspects of state law have changed regarding marijuana use, **employment law** has not.

Proposition 64, which was approved by California voters in 2016 and is now in full effect, made significant changes to California law. In a nutshell, adults (at least 21

years old) are now permitted to possess, smoke, and grow a modest amount of marijuana at home or in a licensed business location. But Prop. 64 also expressly stated that employers would not be directly impacted by the changes to state law. Specifically, it said Prop. 64 would not:

...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 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.

The language could not be any clearer. It's also worth noting that it references federal law, which garnered increased media attention in January 2018 when U.S. Attorney General Jeff Sessions rescinded the Department of Justice's policies discouraging prosecution of federal marijuana crimes. In other words, all aspects of marijuana remain illegal under federal law. The conflicting laws can present somewhat of a conundrum for California employers.

So how should employers deal with marijuana in the workplace? Here are some guidelines:

- You may still require a drug-free workplace and drug test your employees according to existing legal guidelines. Make sure your policies address all types of marijuana use, medical and recreational.
- You can still require applicants to submit to drug tests and refuse to hire someone who tests positive for marijuana use (i.e., THC), even if the individual is using it for medical purposes.
- You are not required to accommodate an employee's current use of marijuana (medical or otherwise), even if the employee suffers from a disability and/or is using marijuana under the direction of a health care provider.

If all of that remains unchanged, what challenge do you face as an employer given the change in state law? The answer is simple: **Some of your existing and potential employees may view Prop. 64 as permission to "flaunt" their use of the substance in the workplace because they**

do not understand that these rights do not extend to their employment.

Ideally you already have policies and procedures in place related to employee use of controlled substances, including a process ensuring employees are aware of those policies and procedures. Every California employer should now be engaging in a renewed education campaign with their employees noting that, despite the other changes in the law, the employer's policies regarding marijuana use have not changed. It is better to tell your employees now, and allow them to adjust their behavior accordingly, than to be forced to discipline or fire them later because of a misunderstanding. An employment law attorney can provide expert guidance on both the crafting of such policies and communication of those policies to employees.

Annie Macaleer is an Associate with Procopio and a member of its Labor and Employment Law Practice Group. She counsels employers on effective ways to reduce their risk of litigation through policy changes, employee handbook updates and revisions, and other human resources issues and strategies. Annie primarily focuses on litigation, defending on behalf of employers. She has significant experience implementing aggressive and early defense strategies, and targets cases toward successful summary judgment or adjudication.