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PERSPECTIVE

## Despite legalization, employers can keep their no-pot policies

By John-Paul S. Deol

California's legalization of marijuana for recreational use marks a significant change in the state's attitude towards the once-illicit substance. While Proposition 64 won 57 percent of the vote last November, many employers are questioning the impact of the new law in the workplace. Considering the hype surrounding the passage of the proposition, it changes very little, if anything, in the employment context. Nevertheless, employers will want to ensure that they understand what has and has not changed in order to update their policies accordingly.

Prop. 64, also known as the Control, Regulate and Tax Adult Use of Marijuana Act, establishes "a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana." Specifically, for those at least 21 years old, the law legalizes the use and possession of up to one ounce of marijuana, the use and possession of up to eight grams of concentrated marijuana, and the cultivation of up to six marijuana plants.

While the recreational use of marijuana is now largely permissible under California law, there will be little impact on the rights of employers to set policies and procedures to restrict marijuana use by employees at work. Quite unlike its failed predecessor, Prop. 19 in 2010, which would have made it illegal to punish, discriminate against, or deny employees any rights based on their legal use of marijuana, Prop. 64 has an explicit carve-out to protect employers. It provides that nothing in the law shall be interpret-

ed to restrict "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." In other words, if an employer wishes to restrict the use of marijuana in the workplace, it is free to do so, much as it is free to enforce a no-alcohol policy.

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While Prop. 64 did not change the laws regarding the use of marijuana for medicinal purposes, employers are still asking whether they are under any new obligations to provide accommodations for those who use marijuana for health reasons. After all, unlike alcohol, marijuana has been shown to help some patients battling a lack of appetite, nausea and even chronic pain. Nevertheless, California law has remained the same since at least 2008, when the California Supreme Court in *Ross v. RagingWire Telecommunications Inc.*, held that California's Fair Employment and Housing Act does not require employers to accommodate the use of marijuana, even for medicinal purposes. *Ross* also held that an employer may even require pre-employment drug tests and take illegal drug use into consideration in making employment decisions. Prop. 64 does nothing to change this.

Of course, notwithstanding California's

legalization of medical and recreational marijuana, the drug remains a Schedule I controlled substance under federal law. Employers are permitted, and in some cases, even mandated to conduct drug tests to ensure that employees refrain from using controlled substances. For example, employers in the trucking industry will note that, if regulated by the U.S. Department of Transportation, they are required under 49 C.F.R. Parts 40 and 382 to conduct drug tests of employees in safety-sensitive positions to determine whether they have recently used marijuana and other substances illegal under federal law.

While the previously illegal status of recreational marijuana made it largely unnecessary for employers to have specific policies aimed at restricting its use at work, the passage of Prop. 64 makes it a good idea to add rules and guidelines specifically discussing marijuana use to employee handbooks and policy manuals. Employees may be confused by the apparent sea change in California's attitude toward marijuana, only to be surprised that the law will not have as dramatic an effect as they might have imagined. The explicit clarification of employee responsibilities with regard to marijuana use in the workplace may help prevent problems relating to the drug's legalization before they occur, saving both employers and employees significant energy and resources.



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