



Even If Marijuana Initiative Passes, Employers' Substance Abuse Policies Won't Go Up In Smoke

Insights

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One of the many ballot propositions facing California voters on November 8 will be Proposition 64, known as the “Adult Use of Marijuana Act.” If enacted it will legalize the private recreational use of marijuana by persons 21 years of age or older. It will also make it lawful for each person to grow up to six marijuana plants for personal use. It will tax and regulate the growth and sale of marijuana as well.

Proposition 64 has been popular in pre-election polling, causing many employers to wonder what impact it will have on workplace substance abuse policies if it passes. Fortunately, it appears that at least initially it would have little impact.

The language of Proposition 64 is clear. Its intent is to allow public and private employers to enact and enforce policies regarding marijuana. The proposition goes on to state that nothing in its language shall be construed or interpreted to:

- Amend, repeal, affect, restrict, or preempt the rights and obligations of public and private employers to maintain a drug and alcohol free workplace,
- 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 addition, the proposition states that it shall not amend, repeal, affect, restrict, or preempt laws making it unlawful to drive or operate a vehicle while smoking, ingesting or impaired by marijuana.

This language makes it clear that if the proposition passes employers will still be able to enforce drug-free workplace policies, including a prohibition on marijuana. Employers will not be required to “accommodate” marijuana use, medical or otherwise; there is already a California Supreme Court case holding that employers need not accommodate the use of medical marijuana. Employers also will be able to continue drug testing of new hires and of employees upon reasonable suspicion of marijuana use. Employers, such as those in the transportation industry, that are required under federal law to conduct random drug testing, will be permitted to continue such testing.

Workplace substance abuse policies should prohibit employees from using, selling, possessing, or having illegal drugs in their system while at work, versus prohibiting employees from being “under the influence” of illegal drugs. This is because a drug test can confirm whether someone has illegal drugs in their system, while being “under the influence” is a more subjective standard. A person could test positive for drugs under the latter standard yet argue that he was no longer “under the influence.” Given that marijuana remains in a person’s system for up to 30 days after use, the question may arise if Proposition 64 passes of whether an employee who engages in legal recreational use of marijuana and fails a drug test weeks later has violated her employer’s substance abuse policy.

The language of Proposition 64 suggests an affirmative answer. The proposition upholds the right of an employer to maintain a drug free workplace. Employees having a testable amount of marijuana in their system would not qualify as drug free. The language of the proposition states that employers may still “prohibit the use of marijuana by employees and prospective employees” without limitation.

Therefore, while court challenges to determine the extent of an employer’s ability to prohibit recreational marijuana use that results in a failed drug test are likely, for now California employers should continue to apply their drug free workplace policy in the event Proposition 64 passes.

Related People



James J. McDonald, Jr.
Partner
949.851.2424
[Email](#)