There (Doesn't) Go the Neighborhood

WHY CALIFORNIA EMPLOYERS DON'T HAVE TO BE 420 FRIENDLY AFTER THE LEGALIZATION OF RECREATIONAL MARIJUANA

Insights
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November 8, 2016 marked an election that will go down in history. On the radar of most California employers is the passage of Proposition 64, which legalizes the recreational use of marijuana for adults 21 years of age and older (The Adult Use of Marijuana Act). However, for the time being, not much will change for California employers.

The new law, which passed with roughly 56% of the vote, does not prevent employers from maintaining and applying zero-tolerance or similar drug policies in your places of employment. Even with the passage of Prop 64, you will be free to screen applicants, administer drug tests, and discipline employees who test positive for marijuana.

Background
While California is typically known as a trailblazing state in terms of new laws, it is a little late to the party that is the legalization of recreational marijuana for adults, following similar laws already passed in Colorado, Washington, Oregon, and Alaska.

In addition to legalizing marijuana use for adults over 21, Prop 64 makes it lawful for each person to grow up to six marijuana plants for personal use. Prop 64 also provides information regarding taxation and regulations pertaining to the growth and sale of marijuana. As a result, you can expect to see an increase of recreational marijuana use among those in your workforce.

How Does This Impact Employers?
The language of Prop 64 is clear. Its intent clearly states that **public and private employers are still entitled to enact and enforce policies regarding marijuana.** The law 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.

The law makes it clear that employers are still able to enforce drug-free workplace policies, including a prohibition on all uses of marijuana. Employers are not required to "accommodate" marijuana use – medical or otherwise. The California Supreme Court already pronounced that employers need not accommodate the use of medical marijuana in the 2008 *Ross v. RagingWire Telecommunications, Inc.* decision.

Employers also will be able to continue drug testing new hires and 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.

What Can You Do To Avoid Any Issues?

First, you should take this opportunity to ensure your drug policies are up-to-date and comprehensive. If you do not already, you should consider implementing and enforcing a zero-tolerance policy to offer you maximum leverage should a situation develop in your workplace. If not already included, you should add marijuana to the list of prohibited substances in your policies.

Second, you should clearly communicate to your workforce that the passage of this law does not change your zero-tolerance policies. Some employees might question your right to be able to restrict their marijuana usage now that the drug is "legal" in California. Feel free to point out to them that the drug remains illegal under federal law, but more importantly, that you have always had the right to prohibit legal substances from being in their system while at work. For example, remind them that your policies have always prohibited them from working while intoxicated, and that they have never been able to show up to work with alcohol in their system despite the fact that alcohol has been legal in the state since Prohibition.

Be prepared for questions from your workforce about the "unfairness" stemming from the fact that marijuana's active ingredient – THC – stays in the bloodstream well after consumption, sometimes for weeks at a time. This is much different from alcohol, which passes through a person's bloodstream at a much quicker rate. Thus, some may inquire whether it is proper for you to send them for testing or discipline them based on legal, off-duty usage of marijuana which may have occurred over the weekend or days before their shift.

You should feel confident, however, in applying your zero-tolerance policies to include recreational marijuana despite this claimed inequity. While it may be unfortunate that you cannot adequately test for marijuana "impairment," that does not mean that you cannot test for and subsequently discipline workers who simply have THC in their system while at work. You can proactively instruct your workers not to do anything in their off-duty lives that would raise your reasonable suspicion once they arrive to work (such as showing up to work clearly under the influence, or engaging in unsafe workplace activities).

Finally, train your managers to spot the signs of marijuana impairment at work. While you are not asking them to become drug detectives, they should be able to recognize the telltale signs of

asking them to become drug detectives, they should be able to recognize the telltale signs of marijuana impairment: bloodshot eyes, lethargic demeanor, lack of coordination, confusion and lack of focus, etc. Just as they have been trained to objectively identify the signs of alcohol impairment at work, they should do the same for marijuana usage. Make sure they are aware of their responsibility when it comes to reasonable suspicion testing procedures, whether it includes documenting their findings and directly sending the employee for testing or otherwise informing Human Resources of the situation.

It is likely that disgruntled employees will eventually bring lawsuits challenging employers' ability to discipline workers for recreational marijuana use that results in failed drug tests at work days or even weeks after usage. However, employers should continue to apply their drug free workplace policy universally – for now.

If you have any questions about this new law, or how it may affect your organization, please visit our website at www.fisherphillips.com, or contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

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