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Clearing the Smoke for Employers on California Proposition 64

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On November 8, Californians passed Proposition 64, legalizing recreational use of marijuana for adults 21 years or older in California. Proposition 64 took effect November 9, 2016. California previously legalized the use of medical marijuana with the passage of the Compassionate Use Act of 1996.

Although some employers may fear that the passage of Proposition 64 will require them to modify their drug-free workplace policies or accommodate employee marijuana use, Proposition 64 provides explicit protections for employers. Specifically, Proposition 64 does not amend, repeal, affect, restrict, or pre-empt:

> 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.

(Health and Safety Code section 11362.45(f).)

Based on the plain reading of the statute, employers may still prohibit employees from possessing, using, or being impaired by marijuana at the workplace. Likewise, Proposition 64 does not modify an employer's ability to refuse to hire an applicant or discipline an employee who tests positive for marijuana.

Despite the passage of Proposition 64 in California, marijuana remains an illegal substance under the federal Controlled Substances Act. (*Ross v. RagingWire Telecommunications* (2008) 42 Cal.4th 920.) Thus, employers may maintain a policy that provides for a workplace free from drugs, including marijuana, as set forth in the federal Controlled Substances Act.

Although Proposition 64 does not modify an employer's rights and obligations to provide a drug-free workplace, employers should review their policies in light of the update to the law. It may be useful for employers to revise existing policies to remind employees of the Company's drug-free workplace policies and practices (e.g. drug testing), and that those policies and practices equally apply to marijuana use. Employers without a policy addressing drugs in the workplace may take this opportunity to create a policy that clearly specifies the Company's position on drugs in the workplace, including marijuana.

Employers should be mindful that ambiguous policies regarding alcohol and substance use may lead to legal issues, as evidenced by a recent California federal district court case, *Justin Shepherd v. Kohl's Department Stores*, Inc. (E.D. Cal. 2016) 2016 WL 4126705. In *Shepherd*, Kohl's terminated Justin Shepherd for testing

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positive for marijuana. However, before Kohl's terminated Shepherd, Shepherd explained to Kohl's that he used medical marijuana off-duty and had a valid medical marijuana card. Shepherd also alleged Kohl's discriminated against him based on his disability, failed to engage in the interactive process, failed to accommodate his disability, wrongfully terminated him, and defamed him. In its decision, the district court confirmed an employer has no obligation under the Fair Employment and Housing Act to accommodate medical marijuana use, and granted Kohl's motion for summary judgment as to all of Shepherd's claims except for breach of implied contract and the covenant of good faith and fair dealing, and for defamation.

Notably, despite ruling for the employer on the disability claim, the court held that Shepherd could pursue claims for breach of contract based on Kohl's non-discrimination clause in its alcohol and substance abuse policy, which stated in relevant part:

> No person will be discriminated against in hiring, termination or in imposing any term or condition of employment or otherwise penalized based upon either: (a) The person's status as a registered medical marijuana cardholder; or (b) A registered medical marijuana cardholder's positive drug test for marijuana components or metabolites.

Shepherd claimed that based on his interpretation of the policy, he could lawfully use medical marijuana at home without being disciplined for a positive drug test. The court allowed this claim to proceed to trial.

Accordingly, employers should be cautious in drafting drug-free workplace policies to avoid creating an "implied agreement" not to discipline or terminate an employee based on the employee's use of marijuana, unless intended. Employers must also recognize that in California, there are strict requirements regarding when and how an employer may test an applicant or employee and even more stringent local ordinances may apply such as in San Francisco. Employers that do not maintain policies that correctly specify when an employee may be tested could be subject to liability for invasion of the employee's privacy. Given the various nuances in drug testing law, employers should consult legal counsel before implementing or revising drug-free workplace policies.

For more information concerning drug-free workplace policies and drug testing, please contact one of the authors or attorneys in the Private Labor and Employment Group or visit our website at www.aalrr.com.