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Are Your Employment Discipline Policies Up in Smoke after Proposition 64?

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On November 8, Californians passed Proposition 64, legalizing the nonmedical (recreational) use of marijuana for adults 21 years or older in California. Under California law, approved ballot measures take effect after the election unless otherwise specified. Accordingly, people over the age of 21 in California are now allowed to "possess, process, transport, purchase, obtain, or give away" not more than 28.5 grams of marijuana or not more than 8 grams of concentrated cannabis. People over age 21 in California are also allowed to "[s]moke or ingest marijuana or marijuana products." (Health & Safety Code § 11362.1.) Paradoxically, the *sale* of nonmedical marijuana in California remains illegal, as licensing and other regulations on the recreational marijuana industry will take effect by January 1, 2018. Despite all this legislation, any use of marijuana—recreational or medical—remains illegal under the federal Controlled Substances Act. (21 U.S.C. §§ 801 et seq.) The federal Drug Enforcement Administration continues to classify marijuana as a "Schedule I" drug, meaning it finds no currently accepted medical use and a high potential for abuse. Significantly, federal law preempts state law, meaning a state and its electorate cannot make marijuana completely "legal."

Previously, our firm published a blog regarding medical marijuana law (California's Compassionate Use Act) and its interplay with employee and student discipline for school districts. [Click here.]

Consistent with the prior state of the law, Proposition 64 explicitly sought to preserve the rights of both *public* and private employers to maintain drug and alcohol free workplace policies. Proposition 64 added Section 11362.45 to the Health and Safety Code, which provides, in part:

> Nothing in Section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:
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> * * *
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> (f) 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.

Further, Health & Safety Code section 11362.3 prohibits smoking or ingesting marijuana or marijuana products in public or within 1,000 feet of a school or day care center. Additionally, Prop 64 amended Health & Safety Code sections 11357 and 11359 to impose penalties for possessing marijuana or marijuana products at a K-12 school or selling or attempting to sell to minors.

--> "Schools receiving federal or state funds are still required to maintain a drug free workplace."

Schools receiving federal or state funds are still required to maintain a drug free workplace. The Drug Free Workplace Act, codified at 41 U.S.C. sections 8101–8106, provides at section 8102 that recipients of federal funds must comply with the Act by "publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of the prohibition." California Government Code section 8355 similarly requires recipients of state funding to maintain a drug-free workplace by "[p]ublishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's or organization's workplace and specifying the actions that will be taken against employees for violations of the prohibition." Proposition 64 did not alter Government Code requirements to provide a drug free workplace, and as a state ballot measure, it was powerless to alter federal law.

Additionally, Proposition 64 does not and cannot impact the federal Omnibus Transportation Employee Testing Act of 1991. School bus drivers and others in safety-sensitive positions must continue to comply with the controlled substances and alcohol use and testing requirements of title 49 Code of Federal Regulations part 382 (2000). The California Vehicle Code likewise requires drug and alcohol testing of these employees in accordance with federal law. (Veh. Code § 34520.) Proposition 64 does not repeal or affect laws "making it unlawful to drive or operate a vehicle … while smoking, ingesting, or impaired by, marijuana or marijuana products, including, but not limited to, subdivision (e) of Section 23152 of the Vehicle Code." (Health & Safety Code § 11362.45(a).)

With regard to employee discipline related to marijuana use, Proposition 64 does not affect the causes for dismissal of permanent certificated employees set forth in Education Code section 44932. Education Code section 44932 does not explicitly identify marijuana use as a cause for discipline; rather, as before, the circumstances, history, and context of such use would be analyzed comprehensively in determining if one or more of the causes for dismissal are met.

Proposition 64's impact on classified employee discipline and dismissals will vary from district to district. The Education Code does not enumerate potential causes; for dismissal of classified employees. Rather, in non-merit system districts, such causes and hearing procedures are determined by the governing board, and also may have been negotiated with bargaining units. In merit system districts, potential causes for dismissal of classified employees are set forth in personnel commission rules. Thus, each school district and personnel commission should review its regulations and rules to determine whether changes may be required in light of Prop 64, subject to collective bargaining obligations.

Previously, we offered that California's medical marijuana laws did not confer upon school employees a right to use, possess, or be under the influence of marijuana at work under the reasoning set forth in *Ross v. RagingWire Telecommunications*, Inc. (2008) 42 Cal.4th 920. In Ross, the California Supreme Court made clear that Californians do not have a "right" to use marijuana as such remains illegal under federal law. Prop 64's amendments to the CUA similarly do not obligate employers to accommodate or allow marijuana use by employees.

It remains to be seen how Proposition 64 may be revised, amended, and impacted by further legislative and regulatory action. Accordingly, we advise schools to consult with their legal counsel as the relevant laws are revised.