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CLARITY FOR EMPLOYERS IN THE HAZE OF MARIJUANA LEGISLATION

by CAROLYN ENCISO SIEVE

The history of federal and state laws regulating marijuana reflects the ambivalence of our cultural views of that drug. Should it be considered inherently dangerous and therefore regulated closely with strict punitive measures to discourage use and distribution? Or is it more akin to alcohol or prescription drugs, the use of which is regulated largely to ensure safety? And how are employers to address employee usage given changing and sometimes conflicting state and federal laws?

Marijuana has been criminalized or otherwise regulated by a patchwork of state and federal laws since the early twentieth century. However, in 1970, the federal government made clear its view that marijuana is a substance with no currently accepted medical use and a high potential for abuse when it included marijuana as a Schedule I drug under the federal Controlled Substances Act (CSA). Although many states since that time began taking steps to reduce criminal penalties for marijuana use, in 1996, California became the first state to legalize marijuana for medical purposes. In 2012, Colorado and Washington became the first two states to legalize marijuana use for recreational purposes, further opening the door to widespread acceptance of marijuana use. Four years later, in 2016, California joined Colorado and Washington in legalizing marijuana for recreational use.

Today, thirty-four states and the District of Columbia have legalized medical marijuana, and eleven states and the District of Columbia have passed laws permitting the recreational use of marijuana. It is expected that more states—maybe even the federal government—will follow.

Where does marijuana legalization leave California employers? The short answer is that state legalization has not changed much. Employers still have the right to forbid marijuana in the workplace because it is a Schedule I drug. As the California Supreme Court held in *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008), because California's Fair Employment and Housing Act (FEHA) does not require employers to accommodate illegal drug use, they are not required to accommodate medical marijuana use in the workplace. Thus, employees who test positive for marijuana, even if the use was off-duty and for a medical condition with a valid medical marijuana card, are not protected just because the use is legal under California law. By logical extension, the subsequent legalization of marijuana for recreational use also does not protect employees who test positive.

Although the *Ross* decision has been on the books for more than ten years, its persuasiveness is diminished due to a groundswell of court decisions and state legislation protecting authorized users of medical marijuana. In fact, fifteen states have enacted laws that protect employees with medical marijuana cards. California may soon follow. In February 2018, two California legislators introduced Assembly Bill 2069 (AB 2069), which aimed to abrogate *Ross* by making users of medical marijuana a protected class under FEHA. However, AB 2069 stalled in committee. Although the bill has not been reintroduced this year, the viability of *Ross* remains in doubt.

The decriminalization of marijuana under federal law may also be on the horizon. The 2018 Farm Bill removed hemp, the plant from which cannabidiol is extracted and which contains small amounts of tetrahydrocannabinol, the psychoactive component of marijuana, from the CSA's Schedule I list. And in July 2019, a House Judiciary Subcommittee held a hearing to obtain input on how to reform federal marijuana laws, including possibly removing marijuana from the Schedule I list.

And even though marijuana clearly remains a Schedule I substance, whether federal authorities will enforce the CSA is uncertain. Under the Obama Administration, the Department of Justice (DOJ), via the "Cole Memo," stated that it would not enforce federal marijuana prohibition in states that "legalized marijuana in some form . . . ." The DOJ under the Trump Administration, however, rescinded the Cole Memo. In response, the House of Representatives, in June 2019, approved a bill that would bar the DOJ from spending money to prevent states and territories from implementing their own marijuana laws. Thus, whether the federal government will prosecute anyone for using marijuana continues to be unclear (though it appears unlikely).

How can California employers steer through the haze? Amidst the legal and cultural changes taking place, there are a number of certainties and best practices on which employers can rely to develop and implement anti-drug policies and practices in their workplace.

Marijuana is still a Schedule I substance under the CSA. Despite congressional reform efforts, marijuana use is still illegal under federal law. And while it is illegal, the rationale for the *Ross* decision is alive and well. Accordingly, employees who test positive for marijuana use are not protected under the FEHA.

Employers can prohibit employees from possessing or using marijuana during work hours or on workplace premises. In fact, California's Adult Use of Marijuana Act (AUMA), the 2016 law that legalized marijuana for adult recreational use, specifically states that it should not be construed or interpreted to restrict employer rights and obligations 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; 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.

Companies that contract with federal or state entities must still comply with drug-free workplace laws. The federal Drug Free Workplace Act of 1988 requires employers with a grant or any single government contract valued at $100,000 or more to ensure there is a drug-free workplace, and the possession and use of controlled substances is strictly prohibited. The California Drug Free Workplace Act contains similar employer obligations and applies to companies that have been awarded contracts or grants by a California agency. Both the federal and California drug free workplace laws require government contractors to notify employees that they cannot, as a condition of employment, engage in illegal drug use. They also require these businesses to establish a drug

free awareness program for their employees.

Certain employers must comply with statutory drug-testing requirements or testing specified in a collective bargaining agreement or contract. For example, employees in safety-sensitive positions in the aviation, trucking, railroad, mass transit, and pipeline industries are subject to federal Department of Transportation (DOT) workplace drug and alcohol testing. The DOT program includes periodic and random testing during employment, even though such testing, under most other circumstances, would implicate privacy concerns. For employers with a unionized workforce, drug testing is a mandatory subject of bargaining. Therefore, employers with a unionized workforce must negotiate their testing policies with the union. Some businesses may have contractual testing obligations.

Pre-employment drug testing is permitted. California employers may require job applicants to submit to a suspicionless drug test as a condition of employment after a job offer is tendered but before the employee begins work, where the employee receives notice of the drug-testing requirement; the collection process minimizes intrusiveness; the test is part of a pre-employment medical examination required of all job applicants; and procedural safeguards restrict access to test results. Interestingly, two states, Nevada and New York, have recently passed legislation that will restrict pre-employment marijuana testing.

Testing upon reasonable suspicion is generally acceptable; random testing usually is not. Heightened expectations of privacy apply once an individual is hired. Accordingly, during employment, drug testing generally is conducted only with reasonable suspicion. The effects of marijuana use include impaired short-term memory; impaired motor coordination; altered judgment; and, in high doses, paranoia and psychosis. Employers should train supervisors and managers to spot these and other objective indicia of impairment, so that at least two supervisors or managers can competently document them and support the need for immediate testing.

Random drug testing is generally prohibited, except in very limited circumstances or where a statute requires or authorizes random drug testing. A San Francisco ordinance prohibits all random blood, urine, or encephalographic testing. Employers who must comply with the DOT program, which includes random drug tests, should be careful not to subject their non-DOT-regulated employees to the DOT drug-testing program.

Although California employers have no duty to accommodate medical marijuana use, they must accommodate drug rehabilitation and disabling medical conditions. As the *Ross* decision held, California employers need not accommodate an employee's use of medicinal marijuana. However, if an employee needs to attend drug rehabilitation or the employee discloses the use of medical marijuana to treat a disabling condition, the employer will have to discuss a means to accommodate the rehabilitation or the limitations posed by the underlying medical condition.

Employers should review their workplace policies for compliance and clarity. Even if not required under the federal or state drug-free workplace laws, because marijuana can impair work performance and because the legalization of marijuana use may confuse employees about their rights and responsibilities at the workplace, it is prudent for employers to communicate their expectations about drug use. In developing those policies, employers should:

- Focus on ensuring that employees are "fit for work" and on the importance of having a safe workplace.
- Identify safety-sensitive positions (i.e., "positions where a momentary lapse of concentration can result in serious injury, death, environmental consequences, or data breach") within the company.
- Consider including in the job descriptions for safety-sensitive positions the essential job function: "Working in a constant state of alertness and in a safe manner."
- Describe the consequences for a positive test result. For some employers, testing positive for marijuana may not warrant immediate termination, particularly workers who are not in safety-sensitive positions.
- Describe the circumstances in which employees can expect to be drug tested and the types of tests to be conducted.
- Specify what constitutes refusal to take a drug test (for example, refusing to provide a specimen, excessive delay in reporting for a test, adulterating or substituting a specimen, or failing to cooperate with any aspect of the testing process). Describe the consequences for refusal to take a drug test.
- Consider using a medical review officer to review laboratory results and evaluate medical explanations for drug test results.
- Train supervisors and managers to recognize and document impairment, and how to handle refusals to test.

Even if legislators and the public are ambivalent about the use of marijuana and its legality, there is no doubt that marijuana use may have negative consequences in the workplace, not only in terms of workers' physical safety, but also lost productivity, and data security breaches. Accordingly, employers should stay in touch with their counsel, and review their policies and practices not only for compliance with current laws but also to ensure employees understand what they can and cannot do.

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