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Changes to CA Marijuana Laws Leave Employers Unaffected

In the 2016 election, California voters passed Proposition 64, which decriminalized the recreational use of marijuana and made California the 8th state where such use is legal. This change came after decades of recreational use being outlawed, and more than 20 years since the decriminalization of medical use with the enactment of the California Compassionate Use Act of 1996. Proposition 64 also created a wide variety of changes in the institutional and cultural treatment of marijuana in the state, including regulation of cultivation, sale, taxing and use, which went into effect on January 1, 2018.

As was encountered with the decriminalization of medical marijuana 22 years ago, changes to the law have created some uncertainty as to how the law affects employer's ability to control the use of marijuana by employees under Drug-Free Workplace policies. The resolution of any uncertainty begins with the simple reality that, despite the new direction California and several other states have taken, the sale and use of marijuana remains federally illegal. The continued illegality of marijuana under federal law created the necessity for the California Supreme Court to clarify the effect of the medical marijuana law on an employers' ability to regulate its use and impact in the workplace.

In the 2008 case Ross v. RagingWire Telecommunications, Inc., the Court upheld the termination of an employee who tested positive for marijuana despite their having a valid prescription. The Court noted that the Act only removes criminal penalties for authorized medical use and nothing more. Marijuana use remained illegal under federal law and thus, the use of medical marijuana was not considered the same thing as the use of other "legal" prescriptions. In the 2012 case James v. City of Costa Mesa, the court ruled similarly, finding that because federal law does not authorize marijuana use, users may not seek protection under the Americans with Disabilities Act (ADA) either.

The newer law relating to recreational use does not deviate significantly from these rulings. Proposition 64 specifically states that it does not amend, repeal, affect, restrict, or preempt "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."

What does that mean for California employers and employees? *Nothing in Proposition 64 limits the ability of an employer to enforce its marijuana-related policies, including testing current and prospective employees, and/or discipline (including termination) under those policies.*

In the midst of the well-publicized changes to California law early this year, another potentially

significant event occurred without significant coverage and whose impact has yet to be fully realized or understood. In 2013, then U.S. Deputy Attorney General James Cole sent a memo to federal prosecutors, advising that their efforts should not be devoted to the use or sale of marijuana in states where it had been legalized. It further advised that prosecutors should leave any enforcement efforts to state and local authorities.

On January 4, 2018, three days after the commercial sale of marijuana became legal in California, Attorney General Jeff Sessions rescinded this policy and directed federal prosecutors to enforce federal law regarding marijuana, and to "follow well-established principles when pursuing prosecutions related to marijuana activities."

While the effect of the new federal enforcement direction remains to be seen, one thing remains clear— the right of employers to maintain and enforce their policies concerning marijuana use remains intact.