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## Industry Insight

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### Marijuana in the Workplace

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Grass, reefer, bud, or pot. Whatever your generation calls it (and the list of nicknames is long and oftentimes amusing), marijuana legalization is a hot topic across the country and in the workplace.

Although the list is ever changing, and may soon change in California, as of the date of this article, Alaska, Colorado, Oregon, Washington State, and Washington, D.C., have all legalized recreational and medical marijuana. Twenty other states, including California, have legalized medical marijuana. Additionally, this year several more states—Arkansas, Florida, and Missouri—will vote on the legalization of medical marijuana while Arizona, California, Maine, Massachusetts, and Nevada will vote on the legalization of recreational marijuana.

Since it went into effect in 1996, California's Compassionate Use Act has permitted the use of medical marijuana for medical purposes. Recreational use of marijuana is still illegal in California. However, Proposition 64, the Adult Use of Marijuana Act, will be on the November 8, 2016 General Election ballot and California voters can decide whether adults may use, possess, purchase, and grow marijuana for recreational purposes. Nonetheless, the changes in state law in California and other states have not affected the legal status of marijuana on the federal level. Using marijuana, medicinally or recreationally, continues to be a criminal offense under federal law.

Notwithstanding federal law, a recent Gallup poll found that a majority of Americans now believe that marijuana use should be legalized for all purposes. Further, a 2015 study by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) found that nearly 9.5% of the U.S. adult population used marijuana within the past year. Clearly, the stigma associated with marijuana seems to be fading.

Should California employers respond to the legal and cultural shift surrounding marijuana? And if yes, how? Let's explore the interplay between marijuana and the workplace:

Scenario One: Employee Uses Marijuana for Medical Condition or Illness.



California law is clear—employers are not required to accommodate employee use of medical marijuana. Applicants or employees who use medical marijuana are not protected under the federal Americans with Disabilities Act (“ADA”) or California’s Fair Employment and Housing Act (the “FEHA”). An employer may terminate, discipline, or refuse to hire an individual who uses medical marijuana even if the individual uses marijuana on a doctor’s recommendation, only uses at home, or the individual’s marijuana use has no demonstrable impact on his or her work performance.

Nonetheless, California and federal disability laws require that an employer reasonably accommodate an employee’s disability if the employer knows of the disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s operations. While reasonable accommodation does not mandate that an employer allow its employees to use medical marijuana, employers are cautioned to tread lightly here. Technically speaking, although it is permissible in California to terminate an employee who is found to use medical marijuana, this is not the ideal solution if the goal is to lessen the risk of litigation. A terminated employee may argue that they were terminated not because they used medical marijuana, but rather because they had an underlying medical condition.

When confronted with a scenario in which the employer believes that an employee is using marijuana (in violation of company policy), but to treat his or her medical condition, the employer should speak with the employee privately. The conversation between the employer and employee should focus on striking a balance between the employee managing his or her medical condition and respecting the employer’s policy of a drug-free workplace. It may make sense for certain employers to soften their drug policy to only prohibit possessing, using, or being under the influence of illegal drugs such as marijuana while on company property or when performing work duties on or off company property.

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This revision would allow employers to maintain a drug-free workplace, but also respect employee privacy and allow employees with medical conditions to get the treatment they need.

### Scenario Two: Drug Testing During the Hiring Process.

California's constitution guarantees an individual's right to privacy which in turn limits an employer's ability to require its employees to submit to drug testing. Generally speaking, California employers are permitted to conduct pre-employment drug testing, post-accident drug testing, as well as drug testing based on an employer's reasonable suspicion that the employee is working while impaired.

Many employers have offered or will offer a job to a highly qualified candidate who subsequently tests positive for marijuana. For some employers the answer is clear, no matter how desirable that candidate is, a positive marijuana drug screen is non-negotiable—the offer is revoked. But other employers may not want to lose a great candidate due to a positive marijuana test. These employers have another option.

According to one of the major drug testing companies in southern California, it is possible for an employer to select a custom pre-employment drug screening panel and choose not to test for marijuana. Essentially, the applicant can be

tested for other drugs with the exception of marijuana. This testing method would eliminate the risk of losing a desirable job candidate due to a positive marijuana test, eliminate the awkwardness of revoking the job offer, yet still screen for harder, unambiguously illicit drugs. Further, it would prevent the legal ramifications of the employer making "exceptions" in its pre-employment drug testing process for certain applicants who test positive for marijuana.

In light of the ever-changing legality of marijuana, instead of blindly following strict drug policies of the past, California employers would be wise to take a critical look at how they manage marijuana in their workplaces with the goal of assessing each scenario individually.

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