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Weed at Work? California Prop 64 in the Workplace

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On November 8, California, along with Massachusetts and Nevada, legalized the recreational use of marijuana. With marijuana now legal in seven states, "[the percentage of Americans living in states where marijuana use is legal for adults rose above 20 percent\[.\]](#)"

In light of this change, California employers have expressed concern regarding the continuing viability of their existing drug testing and use policies, which often contain general prohibitions on the use of illegal substances.

Fortunately, [Proposition 64](#) directly addresses this concern, making clear that it does not affect:

"[t]he rights and obligations of . . . 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."

This provision codifies and extends the California Supreme Court's caselaw holding that employers are not required to accommodate an employee's use of medicinal marijuana, even though its use was legal under state law. The court also concluded that employers could conduct, and make employment decisions based on pre-employment drug tests that screened for marijuana. In light of this holding in *Ross* and the clear language of Proposition 64, employers with policies containing blanket prohibitions on the use of drugs (including marijuana) likely remain lawful.

Nevertheless, employers may observe an uptick in marijuana use of as a result of the Proposition. Thus, employers should review their existing policies and practices regarding drug testing current employees, as California law imposes numerous limits on such tests. For example, employers may generally not compel employees (except those in safety-sensitive positions) to undergo a drug screening without "reasonable suspicion" of impairment. Mandating an improper test could result in claims for invasion of privacy and wrongful termination.

Compliance-minded employers should consult with experienced employment counsel to review policies and practices regarding drug screenings. In addition, management and human resources professionals should be prepared to address employee inquiries regarding marijuana use in light of Proposition 64.

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