



# Helping Employers Wade Through the Weeds of California's Marijuana Legalization Law

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On November 8, 2016, California voters passed Proposition 64, or the Adult Use of Marijuana Act, which immediately made it legal for adults 21 years of age and older to possess and cultivate specific amounts of marijuana for recreational use. (Through a variety of legislative actions, this law and the existing California law pertaining to medicinal marijuana were combined, and the combination is now known as the Medical and Adult-Use Cannabis Regulation and Safety Act.) As of January 1, 2018, California adults can now buy marijuana from dispensaries licensed by the state of California. While several states have legalized marijuana for medicinal purposes, only eight have legalized recreational marijuana, and only very recently. In this brave new world, many employers will have questions about how these new laws affect their existing substance abuse and drug-testing policies.

## What Has Changed?

In reality, not much has changed. While California residents are now allowed to use marijuana off-duty, the new law makes it clear that it does not restrict the rights of employers to prohibit use by prospective and existing employees. Employers can still enforce policies that prohibit the use or possession of marijuana in the workplace, and can still test prospective employees for marijuana and refuse to hire those that test positive. Critically, the new law does not affect existing laws about *when* an employer can drug-test its employees. Generally, an employer may only drug-test a prospective employee until after a conditional offer of employment has been made, and may only drug test its employees if the employer reasonably suspects that the employee is under the influence of a controlled substance.

While it is true that the California Labor Code prohibits an employer from retaliating against its employees for engaging in activities that are legal while off-duty, California courts have not yet had an opportunity to address whether this would apply to an employee's use of now-legal marijuana. However, it is important to note that marijuana remains illegal under federal law and is still classified as a Schedule I drug under the

Controlled Substances Act. Until this issue is specifically addressed by the courts, legislature, or both, an employer can still enforce its anti-drug policies as to marijuana because it remains illegal under federal law.

The federal government under the Trump administration has not shown a willingness to budge from this stance. In fact, the Trump administration has taken steps that suggest greater enforcement of federal marijuana laws. During his presidency, President Barack Obama issued guidance to the United States Department of Justice (DOJ) that federal authorities should generally defer to state laws that legalize marijuana for recreational or medicinal use. President Obama directed the DOJ to only investigate and prosecute more serious marijuana crimes such as drug trafficking activity by the cartels. That directive resulted in the so-called Cole Memo, a memorandum authored by then United States Deputy Attorney General James M. Cole, published throughout the DOJ in August 2013. The Cole Memo essentially described a new set of priorities for federal prosecutors operating in states which had legalized the medical or other recreational use of marijuana. Since the time it was published, many marijuana businesses have been operating under the impression that they were generally immune from federal prosecution if those federal priorities were being met. However, on January 4, 2018, United States Attorney General Jeff Sessions announced that the current administration had rescinded the Cole Memo, signaling a shift toward potentially more aggressive enforcement of federal laws prohibiting the use and possession of marijuana.

Until California and other states that have legalized marijuana enact laws that offer protection to employees for engaging in the legal use of marijuana, employees will be at the whim of their employers' anti-drug policies, as long as those policies clearly define which substances are prohibited.

### **What about medicinal marijuana?**

California has allowed physicians to prescribe marijuana for medicinal purposes since 1996. However, in 2008, the California Supreme Court held in *Ross v. RagingWire Telecommunications, Inc.*, that an employer may refuse employment to an applicant if the applicant tests positive for marijuana even if the applicant was prescribed marijuana for medicinal purposes. Again, marijuana remains illegal under federal law and therefore employers are completely within their rights to enforce anti-drug policies that prohibit its use.

### **So, what should California employers do?**

Employers that wish to prohibit the use or possession of marijuana by its employees in states where it is legal should explicitly include marijuana as a prohibited substance within their policies. Employers can simply draft their policies to prohibit the use of all drugs that are illegal under federal law, but given the current climate, employers should explicitly identify marijuana as one of those drugs for the sake of clarity. Such a policy should make it clear that the employer will not tolerate marijuana possession, use, or impairment by employees while on the job, on the premises, or during working hours. In addition, a clear, written drug-testing policy that employees are required to acknowledge in writing will ensure that employees understand their rights and obligations when it comes to drug-testing.

### **How Nossaman Can Help**

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experienced trainers for State mandated sexual harassment prevention training. Our counseling and training services help employers avoid or mitigate costly administrative proceedings and litigation by proactively reviewing and establishing policies and procedures to be consistently applied in the workplace. Our training workshops and seminars empower our clients to better comply with and navigate the complex labyrinth of employment issues like those associated with harassment and discrimination.