

Don't Fear the Reefer

Managing Employees in the Wake of Proposition 64

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Control, Regulate, and Tax Adult Use of Marijuana Act (“Adult Use of Marijuana Act”)

- Allows local governments to regulate marijuana-related activities, to subject marijuana businesses to zoning and permitting requirements, and to ban marijuana business by a vote of the people within a locality.
- Establishes the Bureau of Marijuana Control within the Department of Consumer Affairs to regulate the marijuana industry.
- Consolidates and streamlines regulation and taxation for both nonmedical and medical marijuana.



Adult Use of Marijuana Act – Purpose

- To establish:
 - a comprehensive system to legalize, control, and regulate the
 - cultivation,
 - processing,
 - manufacture,
 - distribution,
 - testing, and
 - sale of



Adult Use of Marijuana Act – Purpose

- nonmedical marijuana, including marijuana products, for use by adults 21 years and older,
- and to tax the commercial growth and retail sale of marijuana.



Adult Use of Marijuana Act – Intent

- Intent of act includes ...
 - Allow local governments to enforce state laws and regulations for nonmedical marijuana businesses and enact additional requirements for nonmedical marijuana businesses.
 - Allow local governments to ban nonmedical marijuana businesses as set forth in the act.



Adult Use of Marijuana Act – Intent

- Intent of act includes ...
 - Regulate the terms of cultivation, processing, testing, and sale of nonmedical marijuana.
 - Take sale, use, and cultivation off of black market to allow for greater control by state government.



Adult Use of Marijuana Act – Basic Provision

- Legalization re possession and cultivation.
 - Permits adults 21 and older to possess not more than 28.5 grams of marijuana not in form of concentrated cannabis.
 - Permits adults 21 and older to possess not more than eight grams of marijuana in form of concentrated cannabis.
 - Permits personal cultivation of up to six plants.
 - Local agencies may enact and enforce “reasonable regulations to reasonably regulate,” but may not outright prohibit, use and cultivation within expressed limits.
 - Local agencies may not prohibit cultivation, or use within private residence or outdoors on premises of private residence.



Adult Use of Marijuana Act – Bans On Use

- Public places.
- Anywhere smoking tobacco is prohibited.
- Within 1,000 feet of school, daycare, or youth center, except in private residence and then only if non-detectable.
- While operating vehicle.
- Open container in vehicle.



Adult Use of Marijuana Act – Local Control

- Business & Professions Code section 26200(a):
Nothing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, ***or to completely prohibit*** the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.



Adult Use of Marijuana Act – Limitations

- Health and Safety Code section 11362.45:

Nothing [in the provisions permitting personal possession, use, and cultivation) shall be construed or interpreted to amend, repeal, affect, restrict, or preempt:

(f) 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.



So, what does this mean for employers?

- Nothing ... shall be construed or interpreted to amend, repeal, affect, restrict, or preempt ...
- The starting point: *Ross v. RagingWire Communications, Inc.* (2008) 42 Cal.4th 920.



Ross v. RagingWire Comm., Inc. (2008)

42 Cal.4th 920

- **Issue:** Plaintiff, whose physician recommended he use marijuana to treat chronic pain, was fired when a preemployment drug test required of new employees revealed his marijuana use.
- **Claim:** Plaintiff alleged his employer engaged in disability discrimination in violation of the FEHA and terminated him in violation of public policy.



Ross v. RagingWire Comm., Inc. (2008)

42 Cal.4th 920

- **Holding:** Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions.



Important principles from *RagingWire*

- No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users (see *Gonzales v. Raich* (2005) 545 U.S. 1, 26-29; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491-495).
- This is important concept because marijuana is still an illegal Schedule I substance under the federal Controlled Substances Act, 21 U.S.C. § 801.



Important principles from *RagingWire*

■ Schedule 1 Drugs:

- Substances, or chemicals are defined as drugs **with no currently accepted medical use** and a high potential for abuse. Some examples of Schedule I drugs are:
 - heroin,
 - lysergic acid diethylamide (LSD),
 - marijuana (cannabis),
 - 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and
 - peyote



Important principles from *RagingWire*

- The FEHA does not require employers to accommodate the use of illegal drugs.
- The Compassionate Use Act was not intended to effect the relationship between employers and their employees.
- Marijuana, as noted, remains a schedule one drug (no medically accepted use) and thus it is illegal under federal law.



Important principles from *RagingWire*

- The Compassionate Use Act does not speak to employment law ... Neither is employment law mentioned in the findings and declarations.
- Contrast AUMA: “Allow public and private employers to enact and enforce workplace policies pertaining to marijuana.”



Future of Marijuana in Workplace

- Cole Memo (2013):
- Reiterated that federal government would continue to enforce marijuana laws.
- But Cole said that in places that legalized marijuana, federal officials should look to the regulatory systems of states to determine whether they should intervene.
- In states with robust systems, Cole wrote, federal officials should continue to leave the matter to local law enforcement. But states without such systems might face challenges from the federal government, he said.



Future of Marijuana in Workplace

■ Schedule 2 Drugs:

- Schedule II drugs, substances, or chemicals are defined as drugs with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous. Some examples of Schedule II drugs are:
 - Combination products with less than 15 milligrams of hydrocodone per dosage unit (Vicodin), cocaine, methamphetamine, methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin
 - Marijuana denied Schedule 2 status in 2016.



Future of Marijuana in Workplace

■ Schedule 2 Drugs:

- To receive Schedule 2 status, DEA must decide that has some medical benefit.
- Finding must be based upon studies.
- Studies difficult when marijuana subject to Schedule 1 status.
- Raging Wire questionable is Schedule 2 status received.



Summary (so far)

- AUMA does not alter existing law re employer's ability to adopt and enforce policies prohibiting marijuana use.
- Existing law permits pre-employment and certain post-employment testing for drugs, including marijuana.
- Existing law permits employers to adopt drug-free workplace policies.



Effect on Existing Workplace Policies

- Decision: Keep Drug Free Workplace Policy in Place?
 - Pros
 - Allowable under law.
 - Helps employer enforce bright-line rules.
 - Curbs potential safety issues.
 - Defense against discrimination claims.
 - Cons
 - Ignores realities in some workplaces.
 - Problems with testing and enforcement
 - Can cause loss of key employees.



Policy Updates for AUMA

- Drug Free Workplace Policy.
 - Explicitly mention AUMA and provide employees guidance.
 - Set expectations for employees of testing.
 - Remind employees of policy regarding medical marijuana.
 - Safety sensitive positions.



Workplace Conduct Policy

- Key issues.
 - Testing difficulty.
 - Create standards for responsiveness to instructions.
 - Workplace safety standards. Enforce bright line rules?
 - Accident testing protocols.
 - Unreliable intoxication testing parameters.



Topics To Address

- Communication to employees re impact of AUMA.
- California law re employment-related drug test.
 - Pre-employment.
 - Post-employment.
 - Random.
 - Post-accident.
- Hiring Policies.
- Drug-free workplace policies.
- Confidentiality.
- Issues on the horizon.



Communicating AUMA to Employees



Basic Message



Drug Testing



Pre-Employment Drug Testing

- In *Loder v. City of Glendale* (1997) 14 Cal.4th 886, the California Supreme Court upheld pre-employment drug testing.
- “[W]e believe that an employer has a greater need for, and interest in, conducting suspicion-less drug testing of job applicants than it does in conducting such testing of current employees.”



But . . .

- In *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008), the Ninth Circuit held that a city’s policy of requiring all new hires to pass a pre-employment drug test was unconstitutional as applied to an applicant for the position as a page at the city’s library.
- The court concluded that City’s “drug screening policy effects a search within the meaning of the Fourth Amendment.”
- The court concluded that City failed to articulate “any special need to screen Lanier without suspicion.” Accordingly, the pre-employment drug and alcohol test was unconstitutional as applied to plaintiff.



Approach to Pre-employment Drug Testing

- Drug testing of applicants as part of a pre-employment medical examination should minimize intrusiveness through
 - (1) advance notice,
 - (2) use of medical facility and personnel to administer the test,
 - (3) no direct observation of applicant giving a sample,
 - (4) guarantee of confidentiality, and
 - (5) follow-up report to applicant, with opportunity to challenge test results.
 - (*Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1048-51).



Post-Employment Drug Testing



Reasonable Suspicion

- Reasonable suspicion drug testing generally upheld when there is
 - (1) observable phenomena, such as observation of drug use or the physical symptoms of being under the influence, or
 - (2) a pattern of abnormal conduct or erratic behavior, or
 - (3) arrest or conviction for a drug-related offense, or
 - (4) information provided by reliable sources or independently corroborated, or
 - (5) evidence of prior drug test tampering.
 - See *American Fed. of Gov't Employees, AFL-CIO, Local 2391 v. Martin*, 969 F.2d 788, 790, n1 (9th Cir. 1992).



Post-Accident Drug Testing

- “[P]ost-accident [drug] tests are less intrusive than random testing because they are triggered by the employee’s own act or conduct, or by a definable event.” (*International Brotherhood of Electrical Workers, Local 1245 v. Skinner* (9th Cir. 1990) 913 F.2d 1454, 1464.)
- Required under certain federal regulations, e.g., Omnibus Transportation Employee Testing Act of 1991
- Be wary of automatic post accident testing. Based on the evidence presented, OSHA believes that **“blanket post-injury drug testing policies deter proper reporting.”**



Random Testing

- This type of testing has been upheld only for “safety sensitive positions.” (See *Smith v. Fresno Irrig. Dist.* (1999) 72 Cal.App.4th 147, 161-62.)



Implications of Employee's Refusal

- Some California cases have held that the privacy interests of an employee who is fired for refusing a drug test implicate a fundamental public policy, and, therefore, the employee can state a claim for wrongful termination in violation of public policy. (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 456; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096.)



Special Issues Re: Marijuana

- Training is now essential for supervisors in how to spot evidence of marijuana intoxication at work.
- Differences between alcohol testing and marijuana testing. Marijuana is fat soluble. Regular use will result in positive test for many days, even weeks.
- Alcohol is water soluble, meaning that it is quickly eliminated from body. Alcohol concentration level more closely associated with intoxication than marijuana intoxication.



Marijuana Intoxication Symptoms

- Impaired memory
- Bloodshot eyes
- Slow reflexes and impaired motor skills
- Cognitive impairments
- Paranoia
- Drowsiness
- Dry mouth
- Increased appetite.



Training Continued

- Provide management training to those charged with reasonable suspicion testing.
 - Police department training (if available)
 - Other training sources
 - Testing centers.
 - HR Companies (Drug and Alcohol Awareness Training.
 - Acquire “certificates,” etc.



Hiring Issues

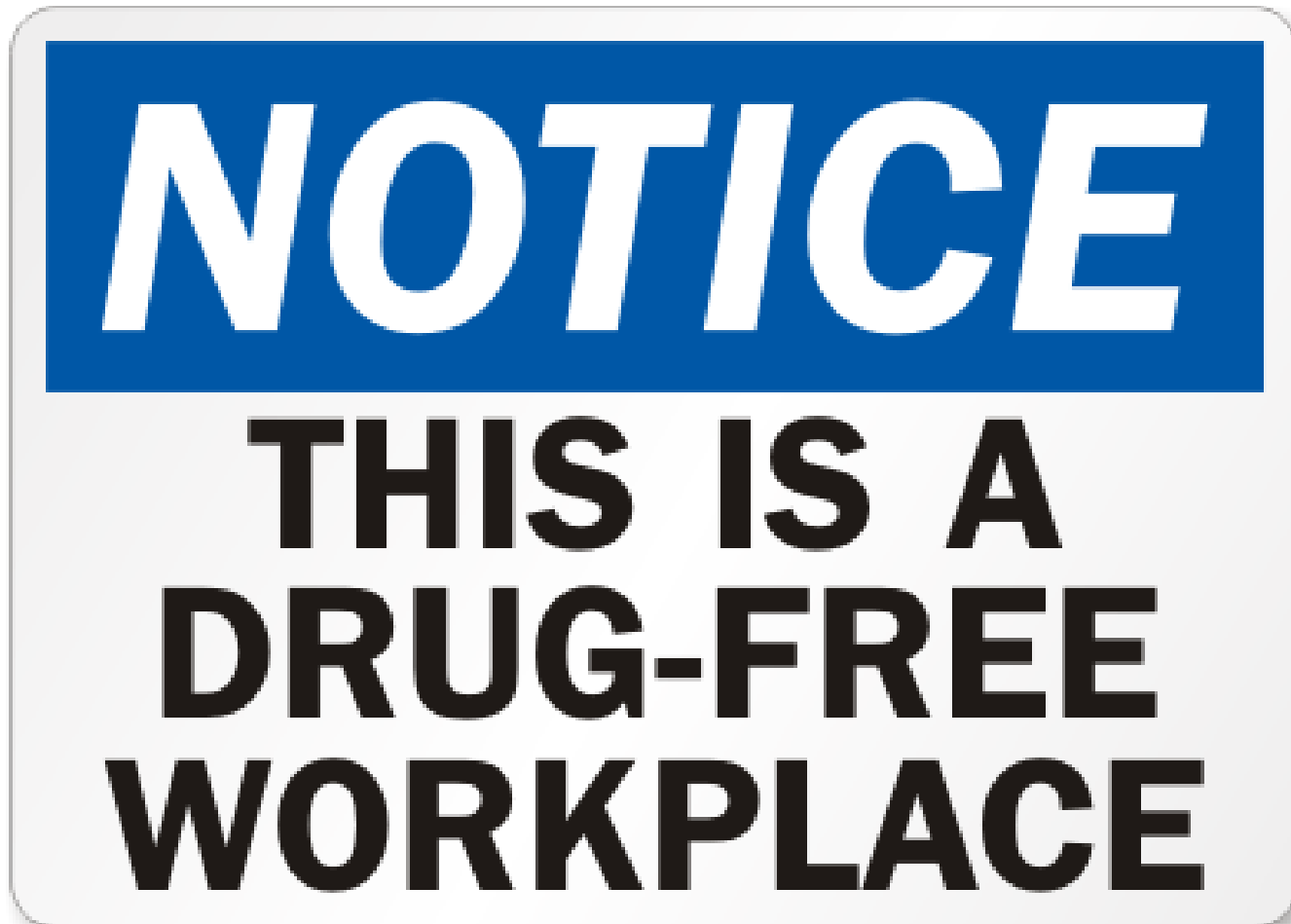


Labor Code Restrictions

- Labor Code § 432.7 – Employers may not use information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law for hiring or employment-related decisions.
- Exception for public agencies hiring or employing public safety officers.
- Labor Code § 432.8 applies restrictions to marijuana convictions more than two years old.
- Labor Code § 432.9 prohibits inquiry into convictions until determination applicant meets minimum job qualifications.



Drug-Free Workplace Policies



Drug-Free Workplace Laws

- Federal Drug-Free Workplace Act, 41 U.S.C. § 8102.
 - Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition.
 - Establishing drug awareness in the workplace.
 - Make compliance a condition of employment.



California Drug-Free Workplace Act of 1990, Gov. C. § 8350

- Requires every employer awarded a contract or a grant for the procurement of any property or services from any state agency to certify the employer has:
 - Published a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's or organization's workplace and specifying the actions that will be taken against employees for violations of the prohibition.
 - Established a drug-free awareness program.



Issues on the Horizon



Anticipating Emerging Issues

- New challenges to pre-employment drug testing.
- Potential conflicts between Labor Code section 432.8 and convictions under new law.
- Drug testing during employment relationship and consequences of decisions to terminate employment.



Conclusion

- For present, employers' ability to adopt and enforce drug-free workplace policies, including marijuana use, remains unaffected.
- Employers should reexamine their policies and ensure they are properly and narrowly tailored to ensure policies are job related and consistent with business necessity.
- Be prepared for new challenges.



Thank You!

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