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Jokers, Tokers & Midnight Smokers: Weed in the Workplace?

Alden J. Parker
Regional Managing Partner, Sacramento
Fisher Phillips

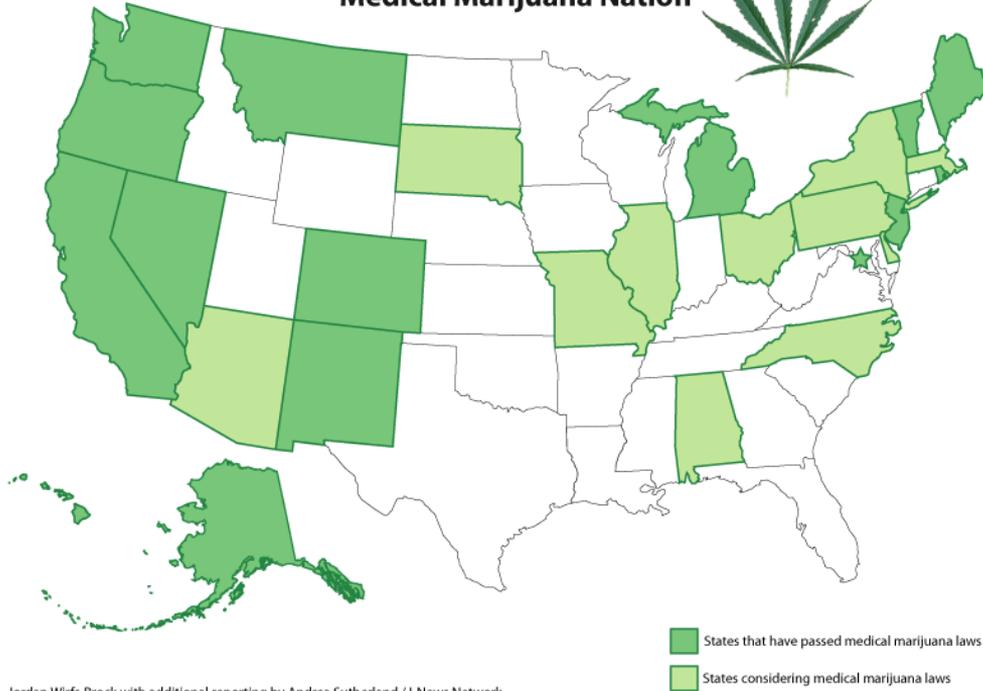


Overview:

- Status of the Law – State vs. Federal
- Overview of Prop 64
- Drug Testing
- Federal Requirements and Insurance
- Medical Marijuana and Accommodation
- The Trump Administration
- Recommendations moving Forward



Medical Marijuana Nation



Status of the Law



Status of the Law - the States:

- Legal Recreational Marijuana – 8 + the District of Columbia
- Legal Medicinal Marijuana – 28 states
- Legal CBD for Medical Use – 44 states
- 65 million Americans live in states allowing some form of marijuana use
- \$6.7 billion dollar industry, with \$21.8 billion projected by 2020



Status of the Law - Federal

Still a Schedule I drug under the federal Controlled Substances Act, which means according to the Feds:

- (1) high potential for abuse,
- (2) no currently accepted medical use in treatment in the US, and
- (3) lack of accepted safety for use of it.





Status of the Law - Federal

- August 2013 – The Cole Memo – “US Attorneys, don’t go out of your way to prosecute marijuana cases”
- August 2016 – DEA refuses to de-schedule, but broader research allowed





Proposition 64 - Adult Use of Marijuana Act



Proposition 64 - In a Nutshell:

- Legalizes marijuana for recreational use immediately for adults over 21.
- Permits adults to grow up to 6 plants for personal use (or 1 ounce).
- Imposes various taxation, licensing requirements and regulations pertaining to the commercial growth and sale of marijuana.
 - Commercial growing / selling – 2018/2019



So, what does all
of this mean for
employers?





Proposition 64 - For Employers:

- Employers still entitled to enact and enforce policies related to marijuana. You do not need to tolerate marijuana use.
- Prop 64 expressly states, that the statute does not:
 - Affect/restrict employers rights to maintain a drug and alcohol free workplace;
 - Require employers to permit or accommodate marijuana use/consumption/possession in the workplace; or
 - Affect the ability of employers to have policies prohibiting use by employees and applicants, or prevent employers from complying with state or federal law.



The Simple Answer:

1. Marijuana is still federally an illegal drug
2. Employers can still enforce drug policies and drug test employees;
3. So far, courts have not treated marijuana the same as traditional prescription drugs; and,
4. So far, employers do not need to accommodate marijuana.



Cannabis & Drug Testing





Drug Testing - Pre-Employment:

- Generally, employers may require applicants to undergo drug tests.
- However, the law is evolving – The District of Columbia temporarily passed the Prohibition of Pre-Employment Marijuana Testing Act of 2015, which prohibits employers from testing employees for marijuana use until after an offer for employment has been made.
- CO Example - Employers may also experience difficulty hiring.



Drug Testing - During Employment:

- Generally, employers remain free to implement and utilize drug-free, workplace programs and policies in spite of Prop 64 and the legal use of marijuana.
- But, should you change your policy language??





Drug Testing - During Employment:

Also, remember CA drug testing requirements:

- Pre-Employment
- Random Testing
- Post-Accident Testing
- Reasonable Suspicion
- DOT Covered Positions



***Don't forget the
basics . . .***



Drug Testing – During Employment:

WATCH OUT FOR PRIVACY - LEGAL OFF-DUTY ACTIVITY LAWS:

- While you may prohibit use in the workplace, current technology does not match the law. Most drug tests detect THC in the system for several days and cannot detect current inebriation. However, clinical trials are underway.
- TO WATCH - Many states (including CA) have Legal Off Duty Conduct Laws protecting legal off duty conduct



Is Medical Marijuana
Different?

Do I Need to Accommodate
a Prescription?





Accommodating Medical Marijuana:

- I have a prescription!
- Employers are not required to accommodate an employee's need to use medical marijuana.





Accommodating Medical Marijuana:

- Shepherd v. Kohl's Dep't Stores, Inc. (2016)
- Ross v. Ragingwire Telecom, Inc. (2008)
- Wilson v. California Dept. of Corrections and Rehab. (2007)





Of Course, it's a Bit More Complicated - ANTI-Discrimination Statutes:

Examples:

- ***New York*** –has incorporated medical marijuana users into other laws prohibiting discrimination based on disability. N.Y. Pub. Health Law § 3369.
- ***Rhode Island*** - “No employer may refuse to employ or penalize, a person ***solely for being a cardholder***” R.I. GEN. LAWS § 21-28.6-4(c)
 - *Current Case: Graduate student* represented by the ACLU suing company for not being hired for paid internship after disclosing medical marijuana use in job interview.



What Does
the Future
Hold?





What Can We Expect From Trump?

- 1990 – War on drugs “is a joke,” “all drugs should be legalized”
- June 2015 – “Medical marijuana 100%,” recreational “is bad”
- Oct 2015 – It should be “a state issue, state-by-state”





What Can We Expect From Feds?

- We have not yet seen prosecutions, forfeitures, or even threatening letters to cannabusinesses.
- Currently, DOJ subcommittee completed an unpublished advisory memo saying that there was *no need to advance new drug enforcement* against marijuana.
- The economic impact and polling tells us that marijuana is likely here to stay:
 - Support for legalization reached an all-time high in 2016. 60% of Americans surveyed by Gallup favor outright legalization.



What is the
Latest?





AB 2069: Medical Cannabis/ Employment Discrimination

- Prohibits employers from engaging in employment discrimination against medical marijuana users on the basis of their use of/positive drug test for cannabis
- Does not prohibit an employer from terminating or taking corrective action against an employee who is “impaired” on the premises during working hours





What Do We Do?

1. Decide your position based on your business needs and business culture.
2. Consider a proactive memo to employees
3. Update handbook and policy if needed, but ...
 - *BE CAREFUL and think expansively
4. Apply policies uniformly.





What Do We Do?

5. Make Sure You're Not the "Test Case".
6. Publicize your policy and train supervisors and managers.
7. Consider eliminating strict post-accident/post-injury testing and replacing it with reasonable-suspicion testing.
8. Keep an eye on new developments in the law.





**Presented by:
Alden Parker**

Phone: 916.210.0404 | Email: aparker@fisherphillips.com